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Note

Justice Unconceived: How Posterity Has Rights

Aaron-Andrew P. Bruhl*

INTRODUCTION

This Note advances a rights-oriented approach to our moral and legal relations with people who will exist long after we die. To understand the theoretical hurdles such an account must overcome, it is helpful to begin with an example.¹ Its facts are stylized, but it is not purely hypothetical.

Suppose that we must choose one of two policies, Depletion or

* J.D. candidate, Yale Law School; M.Phil., University of Cambridge, 2000. Ross Harrison and Matthew H. Kramer gave me extremely helpful comments on an earlier version of this project, and the *Journal's* editors have also provided excellent suggestions. Kramer was especially generous with his time and encouragement, going far beyond what duty required. I bear responsibility for all errors. The reader should note that I typically use "persons" and "people" interchangeably.

1. This example, to which I shall refer a number of times, is adapted from DEREK PARFIT, *REASONS AND PERSONS* § 123 (1984).

Conservation. If we choose Depletion, the world in the year 2200 will be much less hospitable than our world in a number of ways: fewer resources, more pollution, a weakened ozone layer, more vector-borne disease, less biological diversity, and so forth. Conditions in the Depleted future certainly will not be so dire as to make its inhabitants regret having been born, but their lives will in general be much more difficult than our lives today. Under the policy of Conservation, in contrast, we can expect the world of 2200 generally to resemble our own world. Suppose further that pursuing Depletion rather than Conservation advances the self-interested aims of those of us alive today to only a very slight degree.

Most of us intuitively believe that it would be wrong to choose Depletion, and we would look askance at any moral theory that did not ratify our reaction. Yet many of our normally reliable forms of moral reasoning have an extremely difficult time explaining why the adoption of Depletion would be wrong.

The difficulty results from combining an entirely plausible normative precept with certain facts about human reproductive biology. Although it might be a discomfiting thought, the realities of human reproduction make the existence of any particular individual a radically contingent matter. If a small town lacks its own high school, teenagers from that town will go to school with people from neighboring towns; some will eventually have children with people from the other town. Romantic tales of fated love notwithstanding, many of these couples would not have formed if school officials had decided that the small town should have its own school. Instead, different people would have met, and, later, different children would be conceived of different combinations of gametes. Even if some of the same couples formed, the children they produced would not be the same children. This is because identity depends on when one was conceived. A child conceived at a different time would develop from a different combination of egg and sperm, and it would be a different child.²

When it comes to affecting the identities of future people, even an event as relatively minor as the school officials' decision will have profound consequences. In truth, almost *any* trivial event can pre-

2. *Id.* at § 119. These claims about identity are not intended to be contentious. In particular, the claim that different circumstances of conception result in a different person coming to exist does not imply that identity (let alone other features of a person) is only a matter of genetics. The position in the text is perfectly consistent with the claim that different environments and experiences also result in different people existing. Indeed, the same policy decisions that can cause different sex cells to meet will often affect other determinants of identity as well.

vent any two particular reproductive cells from meeting. A substantial policy choice such as that between Conservation and Depletion, even if it had only a modest initial impact on our lives, would easily result in the existence of entirely different persons after several rounds of procreation.³

Now add to these facts about biology the plausible moral principle that an act cannot be wrong if it cannot possibly harm anyone or make anyone who will ever live any worse off in any way. Or, in slightly different terms, the moral proposition is that one alternative cannot be morally worse than another unless there is someone for whom it is worse. Yet if we consider the persons who will exist in 2200 if we choose Depletion, it is difficult to see what kind of complaint those individuals could have against us. They certainly cannot claim to have been made any worse off because of our policy decision, for they would not exist at all, and not lead their worthwhile lives, had we chosen Conservation. If we had acted better and chosen Conservation, other people would exist, and those *other* people would enjoy the more comfortable Conservation world. Since Depletion is worse for no one, it thus appears that we do not act wrongly in choosing it. All the same, most people hold a strong conviction that choosing Depletion would be wrong.

The difficulty in locating the wrongfulness of policies such as Depletion poses a theoretical puzzle that the philosopher Derek Parfit has termed "the non-identity problem."⁴ The problem arises because we normally suppose that an act is not wrong if it cannot possibly harm anyone. But since choices like the one between Conservation and Depletion (and many other policy decisions as well) affect the circumstances of conception in such a way as to result in the

3. For a good exposition of how even small initial changes quickly lead to completely different populations, see Thomas Schwartz, *Obligations to Posterity*, in *OBLIGATIONS TO FUTURE GENERATIONS* 3, 4-6 (R.I. Sikora & Brian Barry eds., 1978); see also PARFIT, *supra* note 1, § 119.

It is difficult to say how much variation is necessary to affect identity. Would I still be the same person if only one gene were different? How many genes must be different? However, I do not think these questions at all threaten the truth of the claim that Conservation and Depletion would lead to completely distinct populations. To make his claim about the contingency of identity less controversial, in part by avoiding difficult questions about how much genetic difference is necessary, Parfit's argument assumes only that any child conceived by a couple *in a different month* (and so involving a different egg) would not have been the same child.

4. Although the non-identity problem is most closely associated with Parfit, I do not mean to neglect others who have also recognized its theoretical interest. Other early contributions include Robert M. Adams, *Existence, Self-Interest, and the Problem of Evil*, 13 *NOÛS* 53 (1979); Gregory S. Kavka, *The Paradox of Future Individuals*, 11 *PHIL. & PUB. AFF.* 93 (1982); and Schwartz, *supra* note 3. Looking back further, Leibniz might have held a similar view. See Adams, *supra*, at 53.

existence of completely different people in the future, then it appears that the choice cannot affect anyone for the worse.

According to Parfit, the solution lies in abandoning our ordinary conception of harming.⁵ We are attracted to that conception because most of our common sense moral thinking is *person-affecting*. That is, when appraising the rightness or wrongness of some act, we tend to think in terms of interactions with particular persons—we ask if an act harms someone, sets back a person's legitimate interests, treats someone as a mere means, violates anyone's rights, and so on. In the case of Depletion, however, it seems impossible to locate the wrongness of our choice in what it does to particular individuals. To accommodate such situations, Parfit argues, our moral theories need to become *impersonal*. When a choice will result in the existence of different people, we ought to look at how well off the resulting people will be, whoever they are. The objection to Depletion would thus be that it does not make the outcome, evaluated in impersonal terms, as good as we ought to have made it.⁶

Parfit admits that he fails in his attempt to find a principle that can guide our relations with future people, but he is confident that such a principle can be found. The solution will likely draw on a quasi-utilitarian principle of impersonal beneficence, he contends, and it most certainly will not be a theory of rights.⁷ This comes as a rather unsettling conclusion, for it is precisely concepts such as rights and justice that have (for better or worse) dominated moral and political theorizing over the past several decades. It should be particularly disconcerting for the legally inclined, since rights are, after all, the most legalistic of our normative categories.

The Japanese philosopher Masaya Kobayashi is even more radically pessimistic about the potential of our cherished person-affecting

5. As developed in Section II.B *infra*, I concur that the problem lies with our understanding of harming. Yet where Parfit thinks it is simply false, I would say it is poorly formulated.

6. See PARFIT, *supra* note 1, at 378, 400, 447 (insisting on a moral theory rooted in impersonality). Other approaches to solving the non-identity problem are certainly possible. At least one commentator has attacked the claim that the policy choice would affect the circumstances of conception so as to create different people. See *infra* note 42. A few have accepted the conclusion that Depletion is not wrong, abandoning our contrary intuition as groundless. See DAVID HEYD, GENETHICS: MORAL ISSUES IN THE CREATION OF PEOPLE (1992); Schwartz, *supra* note 3.

7. PARFIT, *supra* note 1, § 124. In a subsequent paper, Parfit suggests a form of impersonal perfectionism as a solution. On this view, one future world would be better than another if it had more of the best things in life, such as music by Mozart. See Derek Parfit, *Overpopulation and the Quality of Life*, in APPLIED ETHICS 145 (Peter Singer ed., 1986). Others have proposed approaches drawing on communitarianism, AVNER DE-SHALIT, WHY POSTERITY MATTERS (1995), and religion, Thomas Siegel Derr, *The Obligations to the Future*, in RESPONSIBILITIES TO FUTURE GENERATIONS 37 (Ernest Partridge ed., 1981).

moral theories. Kobayashi's recent survey⁸ of the future-persons literature has convinced him that progress on these issues requires that Westerners jettison deeply ingrained notions of individualism and selfhood, and maybe even the modern science that underwrites them. In their place, Kobayashi believes, we need to embrace the holistic ethics of "Universal Unity," "the Global Family Person," and "the Dynamic Wave of Interconnectedness."⁹

Swimming against the current of the Dynamic Wave, I believe that the inadequacy of some of our familiar approaches has been greatly exaggerated. In particular, this Note contends that the person-affecting language of rights is an attractive and appropriate vehicle for understanding our relations with future individuals. Recognizing future people's rights is not a radical proposition requiring revolutionary changes to current moral categories and legal practices; rather, such a recognition is consistent with widely accepted (and analytically sound) understandings of rights.

Now I am certainly not the first to attempt a rights-based approach to the problem. Indeed, the topic of future generations' rights has spawned a growing literature—or, rather, at least two separate literatures, one in law and the other in philosophy, with very little interaction between the two. Some scholars have offered admirable accounts of what the substantive content of future persons' rights ought to be, yet they give little attention to the question of how talking about such rights can make any sense.¹⁰ A number of environmentalists and international lawyers have recently called for the creation of a "guardian" to protect the rights of future generations,¹¹ but a skeptic could well wonder whether such proposals are based on rhetoric rather than rights (laudable as the advocacy might be). In contrast, this Note has relatively little to say about what exactly we ought to do for the sake of future people, and I do not call for any sweeping changes to our moral or legal practices relating to posterity. To the extent that I do discuss the content of future persons'

8. Masaya Kobayashi, *Atomistic Self and Future Generations: A Critical Review from an Eastern Perspective*, in *SELF AND FUTURE GENERATIONS* 7 (Tae-Chang Kim & Ross Harrison eds., 1999).

9. *Id.*; Masaya Kobayashi, *Holistic Self and Future Generations: A Revolutionary Solution to the Non-Identity Problem*, in *SELF AND FUTURE GENERATIONS*, *supra* note 8, at 131.

10. See, e.g., EDITH BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS* (1989). Weiss's book provides a compelling account of the content of our duties to posterity but does not mention the non-identity problem.

11. See, e.g., *FUTURE GENERATIONS AND INTERNATIONAL LAW* (Emmanuel Agius et al. eds., 1998). The concern is by no means limited to academics. The Cousteau Society has collected millions of signatures for its "Bill of Rights for Future Generations." See *One Man's Mission: Pierre Chastan*, at http://www.cousteausociety.org/tcs_news_chastan_mission.html (last visited Apr. 25, 2002).

rights, I emphasize the actual protections that future persons in fact already enjoy under the most plausible interpretation of existing norms and practices.

Some scholars, mainly philosophers, have examined the formal suitability of future people as rights-holders, but they generally have not grappled with the non-identity problem.¹² When they have engaged with the problem, they have typically decided that it makes rights unworkable or meaningless.¹³ The current debate thus combines, on the one hand, a great deal of discussion of what we must do to respect our descendants' rights, and, on the other hand, good reason to worry about the foundations of such claims.

This Note defends the appropriateness of rights-based approaches to our relations with posterity. Despite apparent difficulties, rights are in fact an attractive and theoretically justified way of understanding intertemporal relations. Moreover, according to the most plausible interpretation of current practice, future people already in fact enjoy certain legal rights.

The discussion proceeds in three Parts. Part I addresses the question of why we should look to rights for answers to the problem of future people. It explains why a normative account of intergenerational relations is necessary and why a rights-centered approach provides the correct perspective. I will argue that the focus on rights does not necessarily slight other important moral categories such as duty and virtue. While not denying that there can be much more to our shared moral and political life than rights, I argue that this situation is one in which rights are the appropriate idiom. Part I also introduces a number of distinctions and typologies that are crucial to the argument in the remainder of the Note.

Part II takes up the central question of how it is possible for future people to hold moral or legal rights against us. How could we violate the rights of someone who does not yet exist and might not ever exist

12. *E.g.*, Matthew H. Kramer, *Getting Rights Right*, in RIGHTS, WRONGS AND RESPONSIBILITIES 28, 93 n.8 (Matthew H. Kramer ed., 2001) (explaining why he need not deal with the non-identity problem); *see also infra* notes 40, 42 (discussing other rights-based accounts that explicitly avoid the non-identity problem).

13. PARFIT, *supra* note 1, §§ 124, 127. Joel Feinberg, usually a partisan of rights, apparently thinks rights are inappropriate in non-identity cases. *See infra* note 70. Robert Elliot, too, has recently argued that the non-identity problem makes it impossible to violate the rights of any future person who has a life worth living. *See* Robert Elliot, *Contingency, Community and Intergenerational Justice*, in CONTINGENT FUTURE PERSONS 157, 158-61 (Nick Fotion & Jan C. Heller eds., 1997). *But cf.* Robert Elliot, *The Rights of Future People*, 6 J. APPLIED PHIL. 159 (1989) (taking a more favorable view of the rights of future persons in a discussion that fails to confront the non-identity problem). The exception to the pessimistic trend is James Woodward, who has argued that the non-identity problem does not preclude meaningful discussion of future persons' rights. His account is flawed, however, in that it is not sufficiently general, as discussed in Section II.B *infra*. My account is intended to remedy that limitation.

at all? What if some future persons cannot exist except with their rights violated? Skeptics cannot be blamed for wondering whether the talk of rights is simply nonsense. The aim of Part II is to show that moral, political, or legal appeals to the rights of future people are not mere rhetoric but can actually have sense and substance. My approach diverges from those in the prior literature in that it does not grapple with the metaphysical question of whether future people are the sorts of entities that can possess rights. Rather, it proceeds from the standpoint of practical reason, from which perspective the crucial question is whether our decisions need to be guided by the possibility that our actions could violate the rights of those who exist in the future.

Part III asks what (if anything) the content of future persons' rights might be. Do they in fact have any legal rights against us? To answer the question of content, I look to both domestic and international environmental law as well as the practices of enforcement agencies. While the main concern is to show that future people arguably enjoy some rights already, I also discuss some general limitations on the scope of any plausible normative account of the content of intergenerational rights. This last inquiry will again emphasize, I hope, that a rights-focused approach is an appropriate and desirable way to articulate our concern for posterity.

I: WHY RIGHTS? THE NATURE AND DESIRABILITY OF A RIGHTS-ORIENTED ACCOUNT

Even the most devoted partisans of rights theories have to admit that the problem of intergenerational relations does not, at first glance, look like a context in which rights-oriented thinking has much to offer our normative discourse. This Part aims to show that the case of intergenerational relations is, on the contrary, precisely one of the situations where we do want, and need, rights.

Vindicating the appeal of a rights-centered account involves, in large part, simply explaining what such an account is (and, more importantly, what it is not). However, it also requires at least a brief answer to the more fundamental question of why we should appeal to moral requirements of any sort. Why not rely on our self-interested concern for our descendants?¹⁴

14. As suggested by Richard A. Epstein, *Justice Across the Generations*, in *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 84 (Peter Laslett & James S. Fishkin eds., 1992).

A. *Why Morality at All?*

There are at least two different views that might lead one to resist the introduction of moral or legal discourse into the field of intertemporal relations. The first is the substantive claim that there are in fact no moral or legal requirements governing our behavior toward future persons.¹⁵ I contest this claim in Part II, where I show that future persons can hold rights against us, and in Part III, where I discuss the content of those rights. The second view, which I confront here, is that norms are unnecessary because we can rely on the self-interested rationality of current people.

To be sure, I do not deny that we can have a self-interested concern in the future. One might care about an enduring institution such as a family or a college, for example, and this gives one a reason for action.¹⁶ Nonetheless, I do not think we can go all the way with prudential concern, even when that sensibility has been chastised, as the political theorist John Dunn would urge, by a vigorous imaginative confrontation with the potentially disastrous consequences of our actions.¹⁷ Prudence's purchase would seem to decline precipitously as the temporal horizon lengthens.¹⁸ Worse, it might be that the interests of persons in the near future, still the most likely beneficiaries of even an enlightened prudential concern, could conflict with the interests of more temporally distant persons.¹⁹

15. See Schwartz, *supra* note 3 (arguing that the non-identity problem precludes owing anything to future people). Schwartz does, however, hold that *if* a person *wants* to do something for posterity, one has a duty not to free-ride on the efforts of like-minded contemporaries. A denial of duties toward posterity might of course be merely one manifestation of a broader skepticism concerning morality in general, but I do not attempt here to tackle moral skepticism.

16. See Ross Harrison, *My Interest in Future Generations*, in SELF AND FUTURE GENERATIONS, *supra* note 8, at 82. But note Harrison's statement that self-interest does not provide the *best* reasons for concern regarding the future. *Id.*

17. See John Dunn, *Politics and the Well-Being of Future Generations*, in SELF AND FUTURE GENERATIONS, *supra* note 8, at 70, 74, 78-80.

18. For pessimistic appraisals of the prospects of extending our concern into the further future, see Norman S. Care, *Future Generations, Public Policy, and the Motivation Problem*, 4 ENVTL. ETHICS 205 (1982); and Thomas H. Thompson, *Are We Obligated to Future Others?*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *supra* note 7, at 195.

19. This would be the case if, for instance, a certain policy were good for the next several generations but horrible for the ones after that. The potential for conflict between shorter-term and longer-term future consequences is the main reason why I do not think one should approach the temporally extended case on the model of a chain of discrete contracts (or dialogic encounters or bequests of capital, etc.) between one generation and the one immediately adjacent. An investigation into the relations between abutting generations is a project quite different from mine. Peter Laslett nicely distinguishes some of the different levels of interaction in *Is There a Generational Contract?*, in JUSTICE BETWEEN AGE GROUPS AND GENERATIONS, *supra* note 14, at 24. For examples of models based on interactions between one generation and the next, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 201-27 (1980) (dialogue); and Richard B. Howarth, *Intergenerational Justice and the Chain of Ob-*

Finally, even if we could somehow cultivate a fabulously extended sympathy that embraces even the distant future, we would still have a need for norms of proper conduct. People generally look after their children, pets, and other loved ones simply because they care about them, not because morality or the law requires it; but when people do not behave in this way, as occasionally happens, we want to have some way of condemning those people beyond saying that we disagree with their sentiments. Similarly, we should not want our behavior respecting the future to depend merely on our current affections or preferences.

B. Rights-Based Thinking: Advantages and Criticisms

While it is important to show that our relations with distant future people need to have a normative rather than a merely self-interested basis, I am much more interested in engaging with those who believe that our relations with distant posterity do indeed involve moral considerations but who at the same time deny that rights provide the correct approach. As I mentioned in the Introduction,²⁰ Parfit thinks we need to embrace some form of impersonal beneficence. But despite his uncommon efforts, he concededly fails to find his impersonal solution to the problem. Kobayashi asks us to grasp the nettle boldly and embrace a radically holistic ethics.²¹ Following his route, however, would require the adoption of an unfamiliar—and, to many people, highly implausible—metaphysics. Perhaps a bold metaphysical move will ultimately prove necessary, but I am inclined to exhaust the resources of familiar approaches before resorting to that. The last several decades of theorizing on rights and justice have provided a wealth of material on which to build, and one should not dismiss it lightly. Moreover, to the extent one is interested in policy implications, the legalistic idiom of rights (and necessary correlative duties) is attractive insofar as such a framework assimilates into a legal system more readily than do other normative approaches.

The rights literature is vast and still growing. In contemporary moral and political philosophy, rights are king. At the same time, however, more and more theorists are questioning how salutary the reign of rights has been.²² One faction, already feeling overburdened with demands on its moral schedule, frets about the further proliferation of rights. The proclamation of a right, they suspect, has become

ligation, 1 ENVTL. VALUES 133 (1992) (intergenerational bequest).

20. See *supra* notes 6-7 and accompanying text.

21. See *supra* notes 8-9 and accompanying text.

22. See, e.g., MARY ANN GLENDON, RIGHTS TALK (1991) (criticizing the contemporary dominance of rights discourse).

nothing more than a way of expressing one's preference (and, what makes it more distressing, a politically potent way of expressing it). In another quarter, one hears the worry that all the talk about rights has led to a shallow and impoverished understanding of interpersonal relations. Is the protection of rights all there is to our shared ethical and political existence?

I cannot give these and other concerns about the dominance of rights the full attention they deserve, but it is necessary to offer a brief defense, especially since intergenerational relations appears at first glance to be a particularly inappropriate candidate for a rights-oriented treatment. Regarding the first kind of worry, about rights proliferation, I would simply point out that one can employ rights as one's leading moral category and yet fiercely insist that people have very few rights indeed.²³ As Part III will reveal, the content of future persons' rights tends toward the familiar, not the exotic. While it might be true that rights have multiplied unreasonably, the rights I will describe should find a place on even a very short list of what our rights might plausibly be.

More important than the worry about rights proliferation, I believe, is the rather different contention that rights have impoverished our normative discourse by crowding out concepts of duty and virtue. One of the most eloquent proponents of this view is Onora O'Neill, who argues that a focus on rights excludes much of what has traditionally occupied the core of ethics. In particular, if we believe that respecting rights constitutes the whole of what morality demands, we necessarily disable ourselves from recognizing the existence, let alone the importance, of mandatory virtues and "imperfect duties"—that is, actions that are required, yet to which no one holds a corresponding right to performance.²⁴ If there are duties without correlative rights, then a rights-centered account of intertemporal relations might miss much of what we owe to future people. For a satisfying account of our obligations toward posterity, we would

23. Libertarians, for example, typically exalt the importance of rights yet severely delimit the scope of rights to protections against aggression. *See, e.g.*, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix, 28-35 (1974).

24. *See* ONORA O'NEILL, *TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING* 136-53 (1996) [hereinafter O'NEILL, *TOWARDS JUSTICE AND VIRTUE*]; ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 189-93 (1989). Perfect duties, in contrast, are correlated to rights. (I should note that O'Neill usually says "obligation" rather than "duty," but I prefer the latter since some theorists reserve the former for duties that are acquired via some voluntary act such as promising or contracting.) Joseph Raz has similarly argued that rights-based moralities are impoverished by their neglect of virtues, intrinsic duties, and communal values. *See* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 193-216 (1986).

need to look to normative categories that do not find their basis in future individuals' rights.

This is a serious challenge, but a partisan of rights (and their corresponding perfect duties) can respond to the alleged importance of imperfect duties in several ways. First, it is always possible to re-describe any particular alleged imperfect duty in terms that give it a correlative right. A duty of charity, a standard example of an imperfect duty, does not endow any particular needy individual with a right to alms, but it might be thought to correspond to a right held by the community at large.²⁵ A second strategy, one that asserts exactly what O'Neill denies, is to maintain that so-called imperfect duties are not required at all (although they might be superogatory²⁶). The two strategies can of course be combined: Some imperfect duties are not really duties after all, while those that are duties can be given corresponding rights through verbal redescription. In any case, both strategies preserve the strict correlativity of rights and duties.

Another approach, which I shall employ, is more modest in that it does not require one to insist that *all* duties carry correlative rights. The account set forth in this Note is compatible with an ethical universe that embraces perfect duties (which correlate with rights), imperfect duties, required virtues, and many other forms of moral concern and value. It welcomes a catholic outlook that includes much else besides rights. Yet while I do not deny the existence of requirements that lack corresponding rights, my central contention is that we can understand our relations with future persons in terms of duties that *do* correlate with such rights.

The claim that intertemporal relations can be understood in terms of rights and perfect duties might sound strange at first. Since we cannot now identify particular future persons, and since imperfect duties do not involve particular claimants, this might look like exactly the sort of situation in which we should think in terms of duties without right-holders. The fact that we cannot identify a right-holder beforehand, however, does not in any way preclude the existence of a perfect duty. I have a duty not to throw bottles over my shoulder

25. Or, what is somewhat more complex, the duty could correlate with a right held by each poor person (or charitable group) to some amount of assistance from each relatively well-off person unless the potential donor has already discharged that duty by giving to another poor person (or group). These redescriptions come from Matthew H. Kramer, *Rights Without Trim-mings*, in MATTHEW H. KRAMER, N.E. SIMMONDS & HILLEL STEINER, A DEBATE OVER RIGHTS 7, 25 n.11 (1998).

26. An act is superogatory if it is not morally required but is morally laudable. Yet if one thinks that rights exhaust morality, it can be difficult to avoid the conclusion that every act (or omission) is either impermissible, permissible, or required, leaving no room for superogation. See RAZ, *supra* note 24, at 196-98 (contending that rights theories cannot account for the moral significance of superogation).

(and a duty to make whole anyone so injured) even though I do not know who, if indeed anyone, might be behind me. This duty, unlike a duty of charity, is nonetheless a perfect duty, one to which individuals can on all occasions lay claim. The unclaimability that characterizes imperfect duties is completely distinct from the issue of uncertainty concerning who the relevant claimant is. In the case of future persons, as in the case of throwing bottles, our duties correspond to rights even if we cannot at the moment name their owners.²⁷ Our duties to future persons can thus occupy the part of ethics that is both required of us and *owed to someone*.

The argument, then, is that there can be branches of ethics that do not contain rights, but that this situation involves the branch that does. Of course, someone like O'Neill could easily concede that perfect duties can play a role, yet still insist that at least some of our most pressing duties concerning future persons could fall outside that category. I believe there are difficulties in maintaining such a contention, however, for the most pressing issues in our relations with future persons do not seem like the sorts of situations that typically bring to mind imperfect duties. One of the leading characteristics of imperfect duties—for example, the duty of charity—is that such duties allow discretion in choosing how and to whom to discharge them.²⁸ But while it is easy, in dealings with present persons, to exercise this characteristic discretion—giving alms to some sufficient number of poor people but not to all of them—the model does not apply very comfortably to the areas that often come to mind when we think of our duties to posterity. If our duties concern climate change or biodiversity—and, as I argue in Part III, such environmental matters do in fact make up the bulk of our duties—then the model of imperfect duties fits very poorly indeed, for it would be quite difficult to discharge such duties with respect to *some* future persons but not others. Moreover, many of the demands typically associated with imperfect duties—duties of kindness and compassion, for instance—appear to be qualities that are best manifested in personal encounters rather than in an abstract, transtemporal setting such as the one at issue here.

The considerations just adduced will probably not satisfy a determined advocate of virtues and imperfect duties, and in any case it is not my aim to show that such things cannot have any place in thinking about our duties to posterity. At the risk of dangerously

27. This, of course, requires more elaboration, for which see *infra* Part II. The point for now is not to exhaustively explain how future people's rights are possible but rather to show how this situation fundamentally differs from those associated with imperfect duties.

28. O'NEILL, TOWARDS JUSTICE AND VIRTUE, *supra* note 24, at 148-49.

raising expectations, my best response to such critics might be to gesture in the direction of the completed theory. To strike a rather Rawlsian chord,²⁹ if after due reflection we find that the rights-based approach gives a satisfying account of our central commitments to future people, then that will suffice.

C. A Closer Look at a Rights-Based Account

As I said at the beginning of this Part, the task of showing why a rights-focused account is attractive depends to some extent simply upon explaining what such an account is and what it is not. Yet there have been few details so far. In particular, the central concept, that of a right, has not been adequately explained. The following sections describe in more detail what a rights-based approach entails. The distinctions and typologies introduced here, especially the Hohfeldian analysis of legal relations, will be used repeatedly in Parts II and III.

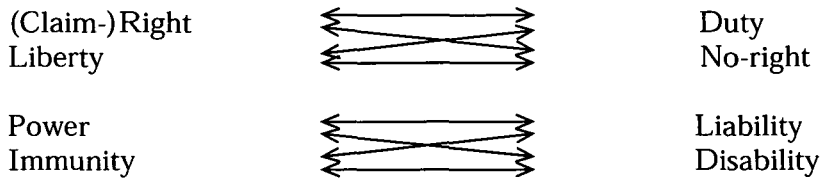
1. What It Means To Have a Right

We use the term “a right” in many different ways. When I say that I have a right to my wages or a right not to be assaulted, for instance, I mean that I have an entitlement that some other person(s) behave toward me in a certain way—to wit, by paying me for my work or by refraining from attacking me. A right to marry whom one pleases, in contrast, evidently signifies something quite different. If I assert such a right, I probably mean that I am under no duty to my parents to take a mate of their choosing; what I almost certainly do not mean (unless I am a prince or a sultan, at least) is that I am entitled to the hand of whomever I happen to fancy. So here the term “right” refers to what I am permitted to do, not to what others are required to do. And while in both of those cases we use the term “right” to designate entitlements concerning behavior—either our own or others’—we also frequently use the language of rights when making second-order statements about the status or variability of those behavioral entitlements. Crucial to the notion of property rights, rivaling in importance the (first-order) entitlement to non-interference that such rights confer, is the property-holder’s legal “right” to transfer her entitlements through gift or sale, thus endowing someone *else* with the entitlements of property ownership (such as claims to non-interference). Similarly, when I refer to my constitutional “right” of free speech, I probably assert not just an entitlement to speak freely but

29. See generally JOHN RAWLS, A THEORY OF JUSTICE 19-21, 578-84 (1971) (discussing his method of justification).

also a fact *about* that entitlement, namely that the legislature may not alter it or take it away.

If we want to know what it would mean for future persons to have rights, we need to disentangle the various usages just canvassed. In doing so, I use the system of deontic logic developed by Wesley Hohfeld, a framework which, as Hillel Steiner puts it, is widely regarded as “[t]he beginning of wisdom in these matters.”³⁰ Hohfeld’s system, which promotes clarity of expression regardless of one’s substantive normative commitments, consists of the following sets of relations:



The horizontal lines denote mutual entailment, while the diagonal lines connect deontic contradictories.³¹

When you have a *claim-right* (or, as Hohfeld usually says, simply a *right*) against me, I am correspondingly under a *duty* to act in a particular way, either affirmatively (as by paying you, for example) or negatively (such as by not libeling you). A *liberty*, in contrast, simply denotes the absence of a duty.³² Thus, if I am at liberty to go to the cinema, that simply means that I am under no duty *not* to go to the cinema; you, correspondingly, have *no-right* that I stay away from the cinema. Moving to the second-order relations, a *power* allows one to create, extinguish, or modify other entitlements on the chart. So when I invite you into my home, for instance, I thereby exercise a power to relieve you of your usual duty to keep out; being susceptible to this change in relations, you are said to be under a *liability* (which, as this example shows, is not necessarily a bad thing). Next, a person who has an *immunity* is not susceptible to the exercise of a

30. HILLEL STEINER, AN ESSAY ON RIGHTS 59 (1994). Steiner’s appraisal of Hohfeld is ratified by the fact that the contributors to *A Debate Over Rights*, *supra* note 25, all employ the Hohfeldian framework despite their fundamental disagreements on other issues. The articles in which Hohfeld expounds his analytic scheme are collected in WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter W. Cook ed., Lawbook Exchange 2000) (1919). In the text I will give only a very brief summary of Hohfeld’s system; for a highly detailed recent exposition and defense, to which I am deeply indebted, see Kramer, *supra* note 25, at 7-60.

31. Note that Hohfeld’s scheme does not include duties without corresponding rights, and so a partisan of those duties can accept the Hohfeldian framework as applicable only to some parts of morality. As I emphasized in Part I.B, my argument is concerned with duties that do correspond to rights.

32. I follow the practice of most contemporary commentators by employing the term “liberty” where Hohfeld spoke of a “privilege.”

particular power; if you have an immunity against me concerning some entitlement, my lack of power to alter it constitutes a *disability* on my part. The foregoing elements comprise the heart of the Hohfeldian analysis.

In common parlance, the word “right” can refer to any of the four positions on the left of the chart. Moreover, what we commonly call rights often in fact combine several Hohfeldian elements. A standard property “right,” for example, brings together, among other things, *rights* against trespass, *liberties* to use the item as one likes (within the bounds set by others’ rights), *powers* to bequeath, *immunities* against divestiture, and so on.³³ For purposes of my discussion of future persons as right-holders, the key category will be rights in the strict sense—that is, we want to know if they can hold claim-rights requiring that we act, or forbear from acting, in certain ways. Also highly important, however, will be powers, particularly the powers of enforcing and waiving the duties correlative to their rights.

Although I have largely been speaking of future persons’ rights, the Hohfeldian analysis emphasizes that these rights would necessarily correspond to duties owed by people alive now. Thus, logically speaking, neither rights nor duties have any sort of existential priority over the other. Yet even though neither side of a coin is existentially prior to the other, it might be that I like to collect coins only because I love to look at portraits of the presidents, the other side of the coin not interesting me in the slightest. In the same way, our substantive normative arguments *justifying* a deontic relationship might emphasize the importance of just one side of the relationship, or indeed might focus on other matters altogether.³⁴

Ronald Dworkin has argued that political moralities can be classified into three categories, depending upon the nature of their ultimate justificatory foundation: goals, rights, or duties.³⁵ Many theories will contain elements of all three, but if we dig deeply enough, Dworkin thinks, we will find one ultimate category from which the others derive. Thus, a normative scheme is rights-based, in Dworkin’s ter-

33. See TONY HONORÉ, *Ownership*, in MAKING LAW BIND 161, 165-79 (1987) (listing some dozen elements); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362-63 (1993) (describing the various entitlements that comprise the Blackstonian conception of property in land).

34. In drawing these distinctions, I follow Kramer, *supra* note 25, at 36-41. Kramer gives the example of a man who wants a slope in his yard so that he can enjoy the downward view from the top: “[H]is justification for introducing the slope into the yard is focused solely or principally on its top-down inclination, to the exclusion of its bottom-up inclination. Yet, if [he] is sensible, his advancing of such a justification will not lead him to maintain that the top-down direction of the slope is logically or existentially prior to its bottom-up direction.” *Id.* at 39.

35. See RONALD DWORKIN, *Justice and Rights*, in TAKING RIGHTS SERIOUSLY 150, 169-73 (1978).

minology, if its fundamental justification appeals to one or more rights.

My use of terms such as rights-oriented or rights-based is not meant to designate a mode of justification that emphasizes rights; on the contrary, these terms simply indicate that my account concerns that part of normative space that contains correlative rights and duties. It is possible to have an account that is rights-centered in my sense and yet duty-based in Dworkin's sense. That is, an account can focus on the part of morality that includes rights (and their correlative perfect duties), but the justification of the content of future persons' rights might refer, for example, to a basic Kantian duty to behave only in ways that are universally valid. Questions of the ultimate justification for the norms governing our conduct with respect to posterity are answered by a substantive moral or political theory far beyond the scope of this project.

Since rights logically correspond to duties, my account is duty-focused just as much as it is rights-focused. But since the realm of duties might extend far beyond that of rights—we can speak of a duty to be virtuous, a duty to maximize utility, and so on, even though those duties are thought not to correspond to rights—it would be misleadingly imprecise to call my account duty-focused. For much the same reason, I usually refer to future persons' rights rather than present persons' duties, although logically speaking we can reinterpret the former in terms of the latter.

2. Moral Rights vs. Legal Rights

Hohfeld was a law professor, and the elucidation of legal rights was his main concern. Nonetheless, his analysis is similarly useful in the case of moral rights. Just as legal norms (laws, in the usual case) create legal rights and duties, moral norms create moral rights and duties.³⁶ The set of legal norms and the set of moral norms share some members, such as the prohibition of murder, but they can also partly diverge, as in the case of failing to rescue a child in distress.³⁷

36. For a defense of the existence and importance of moral rights, see JOEL FEINBERG, *FREEDOM AND FULFILLMENT* 197-259 (1992). Of course, not every norm (legal or moral) creates rights and duties. Some norms help to coordinate expectations, some create practices and endow people with powers according to the rules of the practice, etc. See generally H.L.A. HART, *THE CONCEPT OF LAW* 26-42 (2d ed. 1994) (demonstrating the variety of types of laws).

37. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 203 (2d ed. 1986) ("Generally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself. . . . A moral duty to take affirmative action is not enough to impose a legal duty to do so.") (footnotes omitted). Some jurisdictions do of course impose legal duties to assist those in peril, see e.g. Vt. Stat. Ann. tit. 12, § 519(a) (2001), but the point here is simply that the requirements of law and morality are usually not regarded as coextensive.

Moral norms are often more ambiguous and liable to dispute, but the precise content of legal norms can also be far from clear.

Moral rights most significantly differ from legal rights in that only the latter are enforceable by state coercion. It is possible that some purely moral norms can be enforced too, though not by state machinery. In the pre-legal state of nature, according to Locke's account, each person had a liberty (and maybe a duty) to punish transgressions of rights under the natural law.³⁸ It might be that less energetic undertakings, such as delivering moral criticism, also count as a sort of enforcement activity for moral rights.³⁹ However, as long as one conceives of morality as a system of *reasons* for action, then whether or not moral rights are enforceable is largely irrelevant. As I argue in Parts II and III, future people can indeed have enforceable legal rights, and, in fact, may already have them. But even if they did not, I would emphasize that enforceability should not be taken as the *sine qua non* of meaningful discussion of rights, particularly when it comes to rights held under moral norms.

3. *Why Individual Rights?*

Supposing that one has accepted the desirability of a rights-oriented account, there is still the question of why the right-holding entity should be a future person rather than a future generation. One attractive feature of using generations is that doing so would appear to provide an escape from Parfit's non-identity problem: Though we cannot make any particular person in the Depleted world better off (because choosing Conservation would result in completely different individuals existing), we evidently *can* make a future generation better off.⁴⁰ Does this make a difference, and is it an attractive strategy?

38. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288-90 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690).

39. Raz, for one, urges that we resist viewing criticism as the enforcement of moral rights. Moral rights need not be enforceable, he argues, and the thought that recrimination is the moral analogue of a legal sanction falsely generalizes from the special case of legal rights. See JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 240-42 (1994).

40. Some have used the generational rights approach to avoid the non-identity problem. See, e.g., Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198, 205-06 (1990) (pointing out that her account is not susceptible to the non-identity problem because it uses generations rather than individuals as rights-holders). The generational rights approach clearly fails if we understand a generation as a set of individuals i_1, \dots, i_n . On such a view, Depletion and Conservation will result in the existence of different individuals, and thus different generations, so there can be no talk of our choice making a generation better or worse off. Weiss's approach only succeeds if we define a generation as the people born in a certain time period, whoever they happen to be. Thus, for Weiss, the same generations always exist regardless of which policy we choose, and Depletion does indeed harm future generations. But, as I shall describe in the text, it is difficult to see what it would mean to harm a generation, as an entity, without referring to the individuals that comprise it.

Plainly, many supposed “generational” rights can simply be understood as rights held by each of its members. The most plausible interpretation of a generation’s right to be well fed, for example, is that the persons comprising the generation each have the right to be well fed, and that is an unproblematically comprehensible proposition. While I will usually speak of future *persons’* rights, it is perfectly consistent with my approach to speak of “future generations’ rights” in this shorthand sense. In contrast, it is a highly controversial question whether there can be *inextricably* collective rights such that a generation’s rights could be violated without locating that deprivation in any deprivation of its members.⁴¹ My choice of using persons rather than irreducible collectivities as the holders of rights therefore serves the interest of minimizing the number of controversial premises upon which the argument relies.

There are other reasons for preferring future individuals to groups. First, I prefer the individualistic approach because it requires one to engage the non-identity problem directly. There is something unsatisfying about an account of intertemporal relations that dodges one of the most interesting and difficult challenges.⁴² Second, although I will mostly discuss large-scale issues of justice between temporally distant persons, some of the same conceptual difficulties, including the non-identity problem, also have relevance for controversies in reproductive ethics and “wrongful life” torts.⁴³ A group-oriented ap-

41. Weiss notes that her conception of generational group rights is “consistent with the Islamic approach to rights.” WEISS, *supra* note 10, at 96 n.2. The approach of this Note, however, is to show that future persons’ rights make sense within our own tradition as it stands, not as it perhaps ought to be.

I should note in passing that an appeal to the rights or interests of irreducible collectivities does not in every case provide an escape from the non-identity problem. The problem will re-emerge at the group level if the choice of policies determines which *collectivities* exist in the future. Edward Page, *Global Warming and the Non-Identity Problem*, in SELF AND FUTURE GENERATIONS, *supra* note 8, at 107, 124-25 (discussing the existence of the African-American community as the result of slavery). Note that if we understand a generation as a collective entity composed of persons born between certain years, *see supra* note 40, then the same generation will exist whether we choose Conservation or Depletion, and so the group-level non-identity problem Page identifies does not apply. But there are still the other reasons I give in this Subsection for preferring to use individuals as right-holders.

42. *See, e.g.*, Melinda A. Roberts, CHILD VERSUS CHILDMAKER: FUTURE PERSONS AND PRESENT DUTIES IN ETHICS AND THE LAW 95-98 (1998). The bite of the non-identity problem is that the person who we intuitively know has been victimized could not exist in a non-victimized state. Roberts simply asserts that the victim might have existed in a non-victimized state, thus wiping out the conceptual problem of explaining the nature of the wrong. Given the contingency of identity, in particular the sheer number of possible egg-sperm combinations, it is quite outlandish to deny that policies like Depletion and Conservation would, as a matter of empirical fact, lead to distinct populations fairly quickly. *See supra* note 3 and accompanying text.

43. For a discussion of the non-identity problem and preconception tort lawsuits, *see* Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 SOC. PHIL. & POL’Y 145, 168-76 (1986).

proach cannot help us assess the conduct of parents or doctors in producing a single child. By offering an approach applicable to both kinds of cases, micro and macro, a focus on individuals thus has the advantage of generality.

In addition to the question about the nature of the right-holding entity, there is a parallel question about the duty-bearer. I usually just say “we”—e.g., “*we* have a duty to future people.” The nature of this “we” is admittedly a bit unclear. Does it mean you and me and everyone else *individually*, or does it somehow mean *us as a collective whole*? Which one of these entities bears a duty to prevent ozone depletion? And do I discharge my duty if I personally do not buy CFC-releasing products, or is more required? Whether the duties corresponding to future persons’ rights are held by current individuals versus current collectivities is an important question, but the problem is in no way limited to the particular case of duties owed to future persons; indeed almost any discussion of policy matters will confront the same questions. For that reason, I will only note that there is an issue here; a lengthier project would need to address it in more detail.⁴⁴

II: HOW RIGHTS?

Normal adult humans are the paradigmatic, if not necessarily the exclusive, holders of rights. Among those theorists who attempt to broaden the domain of rights-holding, the standard approach follows a sensible pattern: Start with the paradigm case of a normal adult human and distill its salient features, then assemble a list of hard cases—trees, goldfish, the permanently comatose, the unconceived—and see how closely they measure up to the standard.⁴⁵

To someone unfamiliar with the literature, however, surely this would seem like a rather strange way to frame the problem of future persons’ rights. In the case of goldfish and trees, the question is whether they are the kinds of entities that can have rights. The situa-

44. A recent overview of some of the issues is GREGORY F. MELLEMA, *COLLECTIVE RESPONSIBILITY* (1997); see also PARFIT, *supra* note 1, §§ 25-31; Carl F. Cranor, *Collective and Individual Duties to Protect the Environment*, 2 J. APPLIED PHIL. 243 (1985).

45. See, for example, Joel Feinberg’s comments:

One way to approach these riddles [i.e., the “spectrum of less obvious cases”] is to turn one’s attention first to the most familiar and unproblematic instances of rights, note their most salient characteristics, and then compare the borderline cases with them, measuring as closely as possible the points of similarity and difference.

Joel Feinberg, *The Rights of Animals and Unborn Generations*, in *RESPONSIBILITIES TO FUTURE GENERATIONS*, *supra* note 7, at 139, 140; see also Kramer, *supra* note 12, at 92 n.3 (“[The question is] whether the interests of those creatures and things [i.e., plants, animals, inanimate objects] are sufficiently close (in morally pregnant respects) to the interests of mentally competent human adults.”).

tion of future people is fundamentally different, for it is obvious that they will be paradigmatic rights-holders;⁴⁶ they simply are not so *yet*. The key feature of the problem, I would suggest, is not the nature of the beings but the intertemporal nature of our relationship with them. The standard approach, then, seems misdirected in using the same analysis for future people as for present goldfish. My approach highlights diachronicity as the crucial element and therefore requires a discussion of temporal issues more extensive than those in the current literature.

What my preferred approach does not do is engage in a moral or metaphysical inquiry into whether unconceived people are, right now, the kinds of things that can have rights even as we speak.⁴⁷ It is an extraordinarily interesting question whether our actions violate their rights now, or only later, once the unconceived exist in flesh.⁴⁸ What matters from the point of view of practical reason, however, is the different question of whether we can stand in a right-duty relationship with future people. This Part of the Note addresses that question, and answers it affirmatively. It grapples with two kinds of obstacles: those associated with mere futureness and those related to the non-identity problem. The argument generally appeals to intuitive understandings of how we use rights-language, supported by examples from actual practice.

46. Implicitly, then, my account concerns only future competent human adults. But *if* presently existing non-human animals and comatose humans and the rest can have rights, then I suppose that my argument, if successful, would remove any obstacle, in principle, to future members of those classes being potential right-holders as well.

47. Even if we decide that unconceived persons are the sorts of entities that can currently possess rights, that conclusion would not by itself solve the non-identity problem. Kramer, who argues convincingly that unconceived persons are currently eligible holders of rights, does not purport to resolve the puzzles raised by the non-identity problem. *See supra* note 12. Thus, even if the type of inquiry exemplified by Feinberg and Kramer is part of a complete answer to the problem of future persons' rights—and I believe that it is—it is not all of it.

48. Some observers apparently think it obvious that unconceived future people must currently lack rights. *See, e.g.*, Richard T. De George, *The Environment, Rights, and Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *supra* note 7, at 157, 159 ("Future generations by definition do not now exist. They cannot now, therefore, be the present bearer or subject of anything, including rights."). But such a claim is a severely simplifying overstatement. Consider the following:

The holding of a right is a relational property, in much the same way that being spoken about by someone else is a relational property. If I speak about Julius Caesar at some time *t*, he acquires at *t* the property of being spoken about by me. . . . Much the same applies, *mutatis mutandis*, to the holding of legal rights by people who have not yet been conceived. Their holding of such rights consists in the owing of legal duties to them by present-day people.

Kramer, *supra* note 12, at 54.

A. Problems of Mere Futureness

For now, assume away the non-identity problem. We shall suppose that regardless of which choices we make, the same people will exist in the future. Even with that assumption, it might still seem strange to speak about future persons' rights. What considerations might lead one think that a right-duty relationship could not obtain between them and us?

One fact about future people is that we do not know who exactly they will be. But surely *this* is not the problem.⁴⁹ As I explained earlier,⁵⁰ standard duties to take reasonable care correlate with rights even though the identity of the right-holder might be unknown at the time of acting. For example, if I negligently shoot a gun into the air and the falling bullet kills your prize pig, then I have violated your right to non-interference with your property and now owe you redress; that I did not know whose, if anyone's, property I would damage has no bearing on the existence of the right-duty relationships.⁵¹ If there is a problem with having duties toward future people, it is not simply that we do not know who they are.

Much more relevant to the question is the obvious but nonetheless important observation that future persons, being future, do not now exist. Again, however, our understanding of rights can accommodate this complication. Suppose that my preferred method of mayhem involves setting off shrapnel-filled bombs instead of shooting guns. I plainly have a duty to refrain from doing this. Indeed, there are probably a number of duties forbidding such conduct, some of which are probably owed to the state or to the public rather than to individuals, and some of which might concern merely building the bomb or buying materials. From among these various duties, the one of concern here is what should be the perfectly uncontroversial duty of respecting other persons' bodily integrity. Where, if anywhere, can we locate the correlative right to bodily integrity that my bomb-setting conduct violates? If I leave the bomb in a busy street, its timer set for

49. *Contra* Ruth Macklin, *Can Future Generations Correctly Be Said To Have Rights?*, in *RESPONSIBILITIES TO FUTURE GENERATIONS*, *supra* note 7, at 151, 152 (denying rights because members of future generations are unidentifiable).

50. *See supra* Section I.B.

51. Of course, my conduct is wrong in other ways as well. I have probably broken the law even if the bullet falls harmlessly. And if all persons have a right to be free of recklessly imposed risks, then I have violated all of those rights too. (There is, as well, the issue of any rights the pig might possess.)

In the example I have given, the victim is unknown at the time of the perpetrator's act but becomes known after the damage has actualized. But it is not necessary that we *ever* learn the identity of the aggrieved party. A relevant example would be a case in which a polluter makes illegal discharges that increase the frequency of some illness, but where it is impossible to discover which incidences of the illness are due to the polluter's activity.

one minute, the case should duplicate the relevant features of the gun example above, a situation in which the ascription of rights makes perfect sense even though the identity of the future victim is unknown at the time I act.

More relevantly for our purposes, what if I instead set the bomb to detonate a couple of hundred years hence, enough time to ensure that the future victims of my mischief are currently non-existent? Despite their current anonymity and non-existence, it is nonetheless living, breathing, interest-bearing persons who stand to suffer from my actions. Whether the bomb maims people tomorrow or next century, do we not explain the wrongness of my act in exactly the same way? In both cases, we would say that it is *for the potential victims' sake* that I ought not plant the bomb, and it is *their due* that I refrain; all indications are that both cases concern the part of morality that is owed to others and to which they are entitled as of right. Does it matter, in principle, if the time-delayed injury results not from shrapnel but instead from ultra-violet radiation penetrating a predictably and recklessly depleted ozone layer?⁵²

If the thought of right-duty relationships between future persons and current persons still registers as a bit odd, it will probably seem much more natural in a less exotic context like products liability. Suppose, for example, that a car manufacturer produced a seriously defective car five years ago. The production defect manifested itself recently, and the car ran off the road, injuring both occupants. The teenaged driver sues to recover damages for her injuries; the injured passenger was the four-year-old child she was babysitting, and his parents sue in his name. Presumably everyone would agree that the driver, assuming she can present the proper evidence of the defendant's culpability, satisfy the statute of limitations, and so forth, has suffered a cognizable violation and has right to recover. Is there a different reaction with respect to the child? I strongly doubt it, and, indeed, most people probably would not even notice that the child had not been conceived when the defendant acted. It simply is not important to us. A large number of tort cases brought in the name of young children undoubtedly result from activities that occurred be-

52. One might object that the bombing is mere wanton destruction while the ozone depletion results from processes that confer valuable present advantages. Part of the nature of duties is that they typically require some sacrifice on the part of the duty-bearer. To be sure, at some point the value of ozone-depleting activities could excuse or outweigh the subsequent damage, in which case the ozone depletion would not be wrongful; but this is all a matter of the *substantive content* of intertemporal rights and duties, not an impediment to their grammatical feasibility.

fore their conception, and, if only statutes of limitations were longer, the same would be true of many cases involving adults as well.⁵³

Now return to the case of my bomb-making activities. Suppose I planted my time-bomb thirty years ago, setting it to detonate today. When it explodes it maims two people: a woman who is now fifty years old and a man who is now twenty-five. The young man, in other words, was not alive when I planted the bomb. I am still alive today when the bomb explodes. Now it seems everyone would agree that I have violated the woman's right to bodily integrity. Would anyone be inclined to say that I have violated *only* the woman's right, but not the young man's? Could one sue me in tort but the other not? I cannot see any way whatsoever to say "yes" to either question, which shows that it does not matter to either our intuitions or our legal system that the actions that cause the injury occurred before the eventual victim's existence. *The mere fact that a person does not now exist does not mean that what we now do cannot violate his or her rights.*

That is an important conclusion, but in the practical cases with which we are concerned—global warming and so forth—there is the additional complication that the person causing the harm will no longer exist when the harm actualizes. In terms of the example given above, our situation is equivalent to a scenario in which the bomb-maker dies immediately after setting the timer. This wrinkle, however, bears only on questions of recovery, not on the question whether a violation has occurred. If the police had only two possible suspects in the bombing, one alive and the other deceased, surely our evaluation of whether the victim's rights were violated would not have to wait until the crime lab matched up the fingerprints found on the timer. If someone initially suspected that the living person was the culprit and that he had violated the victim's rights, would evidence implicating the deceased bomber cause her to change her mind and decide that the victim's rights were not violated after all? I would think not, for the results of the investigation tell us *which* sus-

53. The main context in which courts would even notice that the plaintiff had not been conceived at the time of the defendant's action is the situation in which a woman receives negligent medical care or ingests a defective drug and then later conceives and bears a child who suffers from some birth defect. While considerations of foreseeability or intervening causes might prevent a plaintiff from prevailing in any given case, courts generally agree that the mere fact of the plaintiff's non-conception at the time of the defendant's wrong should not bar recovery. *See, e.g.,* Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1254-56 (Ill. 1977); Walter v. Rinck, 604 N.E.2d 591, 594 (Ind. 1992); Lough v. Rolla Women's Clinic, 866 S.W.2d 851, 853-55 (Mo. 1993); Graham v. Keuchel, 847 P.2d 324, 364-65 (Okla. 1993). The chief exception is New York, which bars preconception tort suits on policy grounds. *See* Albala v. New York, 429 N.E.2d 786 (N.Y. 1981). *See generally* Julie A. Greenberg, *Reconceptualizing Preconception Torts*, 64 TENN. L. REV. 315 (1997) (summarizing the current state of the law).

pect violated the rights and whether or not there is someone around to imprison and from whom to recover damages. We do not need the lab report in order to know that one of the two suspects violated the victim's rights.

If the bomber is long deceased, the victim will have a hard time recovering damages from him. Yet lawyers often speak of defendants who are "judgment-proof" because they lack assets (or at least assets the court can reach), and in those familiar cases a victim's inability to recover from a judgment-proof defendant does not mean that the victim's rights were not violated. Nor is it even necessarily true that recovery is impossible in the intertemporal example I have been discussing, for we can imagine that the law would permit victims to sue the estate (supposing there is one) of a deceased victimizer. Are the victims' rights violated if the bomber has an estate, but not if he does not? Again, does the decision have to wait to see if he has one? As before, the answers to these questions bear on the practicability of recovery after the fact, not on the existence of a right-duty relationship between temporally separated victims and victimizers.

The model of a suit against the successor in interest of a deceased wrongdoer might make sense in the context of the bomb example, but I do not mean to imply that this is the model for dealing with problems like ozone depletion, pollution, and the like. What we really want to know in such cases is this: If we are currently acting in a way that violates future persons' rights, can their rights somehow be enforceable against us now? Future people certainly cannot do that for themselves, but as with the rights of children and the insane, their rights can be enforced through representatives vested with the appropriate legal powers. I deal with the matter of enforcement below,⁵⁴ and I show that the ability to enforce correlative duties personally—something future people cannot do—is not a necessary feature of right-holding. Now, however, I turn to the problem of explaining how future persons' rights can survive the test of the non-identity problem.

B. How Non-Identity Is Not a Problem

So far, the argument has established that mere futureness, which includes present non-existence and anonymity, does not block the ascription of rights and duties between future persons and us. Yet I have not tackled what Parfit and some others see as one of the most difficult challenges facing a rights-centered account of our relations with future persons. Large-scale decisions about energy policy, for

54. *Supra* Section II.C.

instance, will with virtual certainty and in very short order determine the identities of future humans. Thus Parfit's non-identity problem, discussed in the Introduction.

I concede that it is difficult to see how a person can have a right to be free of some injury—whether caused by shrapnel, global warming, etc.—when the person can exist only with the injury, especially if one assumes, as I shall, that the victim's life is nonetheless well worth living.⁵⁵ If a future person could somehow complain to us that some right of hers is violated because of our choice of Depletion, those of us alive today could with all honesty reply that she could not exist with that right fulfilled. If this were a valid response, it would tend to show that rights were meaningless in cases where present actions determine the identities of future persons—in other words, in every practically important case. The following pages argue that it is not a valid response.

1. Wrongfully Creating Rights

The first obstacle raised by the non-identity problem is that the Depletion people, whom we assume have some right *Z*, such as the right to be free from injury caused by an environmental toxin, cannot exist except with *Z* violated. This fact might at first seem daunting, perhaps because it appears to implicate the familiar maxim that "ought implies can." Yet it is absolutely false to say that it does not make sense to talk about rights that cannot be fulfilled or to condemn those who violate them. The world of rights and duties is not static but dynamic: They can spring into existence because of what we do, and they can disappear for the same reason.⁵⁶ Making promises and signing contracts, for example, create rights in promisees and duties in promisors.⁵⁷ If I promise to deliver a product to you, I have created in you a right to that product, and we would have no sympathy for the promisor who tries to deny his violation of the right by saying he knew all along he could not possibly honor it. In this case, the fact that the right cannot be honored does not mean it cannot be violated. That the Depletion people cannot exist with right *Z* protected does not necessarily render talk of violating *Z* meaningless.

55. See *supra* note 13 and accompanying text (discussing skepticism regarding rights-based approaches in non-identity situations).

56. I certainly do not contend that *all* rights and duties are of this sort. Some can exist regardless of any action or choice.

57. Such activities therefore exercise "powers" according to the Hohfeldian system. See *supra* Subsection I.C.1.

But an opponent of future people's rights might respond as follows. Suppose I have promised to provide someone with two different products, *A* and *B*, even though I know ahead of time that I will not be able to provide *B*. While I breach part of the agreement, my delivery of *A* predictably makes my promisee better off than he would have been had I not made the *A*-and-*B* promise at all.⁵⁸ Now perhaps much the same applies to persons in the Depleted future: Maybe we have violated one of their rights by not respecting right *Z*, but they are nonetheless no worse off for what we have done, for we have caused them to exist with a life worth living.⁵⁹ And if future people are not any worse off because of our actions, that might lead us to think that our conduct could not have wronged them (at least as long as their lives are well worth living), regardless of any right *Z* that they might have. Either our violation of the right would be excused by the fact that the "victim" is no worse off, or perhaps the very fact of not being any worse off would show that the right was not actually violated in the first place. Either of these conclusions would tend to make discussions of future persons' rights, though not flatly unintelligible, at least worthless.

While intuitively attractive on some level, the alleged link between violating rights and making someone on balance better or worse off misses the whole point of a rights-oriented theory (and of other deontological theories as well). A right protects one or more of a person's interests or protects an *aspect* of its owner's well-being, not his overall index of welfare (if such a thing even exists). It is a famous complaint about aggregative theories such as utilitarianism that they "[do] not take seriously the distinctions between persons," instead treating persons as so many interchangeable addends in a social sum.⁶⁰ Just as importantly, however, one must not treat a person's various rights and interests as contributions to a homogenous pool of *personal* well-being: *No utilitarian calculus between persons*, the motto would run, *and, equally, no utilitarian calculus when acting toward a single person*. If you are under a duty not to do something to me, then you ought not to do it, even if doing it confers some other benefit on me that would leave me no worse off overall.⁶¹ I still

58. This helpful example comes from James Woodward, *The Non-Identity Problem*, 96 ETHICS 804, 810 (1986).

59. The "no worse off" language is important. The stronger claim—that they are better off—might rely on the controversial view that causing someone to exist benefits that person, which in turn might require an impossible comparison between existence and non-existence. On the question of whether causing to exist confers a benefit, see PARFIT, *supra* note 1, app. G.

60. RAWLS, *supra* note 29, at 27.

61. Woodward has pressed a form of this manifold-and-separate-interests argument

violate your rights if I knock you momentarily unconscious, even when I leave you the diamond-encrusted baseball bat I used to do it.

Of course, it might well be that the victim in such a case, knowing that the rights-violation would not make him any worse off, would waive his right. That possibility is explored below in Subsection II.B.3. First, though, I remedy a limitation of the argument above.

2. *Beyond Promisors and Procreators*

One might object that the crucial feature of the previous Subsection's argument was that it relied on an analogy to the case of rights that were brought into existence by an irresponsible promise to provide someone with certain items, some of which cannot be provided. If the argument only reached such cases, then it would appear that the wrongfulness of such conduct does not really consist in the violation of any right, but rather involves the wrongful exercise of a Hohfeldian power, namely the creation of rights that cannot be fulfilled. But if the wrong consists in the *creation* of rights that cannot be respected, then it looks like the argument would not apply to our relations with distant posterity. For while parents (or fertility doctors) quite straightforwardly bring children (with their rights) into existence, only in a very indirect sense can those of us alive now be said to bring into existence the persons who are born in the further future. In such a case it seems we cannot really be guilty of *creating* rights that will be unmet. The work of James Woodward, who has come closest to providing a rights-based response to the non-identity problem, unfortunately relies on the model of irresponsible creation of rights and duties.⁶² But if we are to provide a fully successful account, we must move beyond that model.

against Parfit. See James Woodward, *Reply to Parfit*, 97 ETHICS 800 (1987); Woodward, *supra* note 58, at 808-21. Note that the fact that *I* might trade off one of my interests against another—for instance, by allowing a doctor to remove a limb in order to prolong my life—does not necessarily show that I am a vessel of monolithic utility; but even if it did, that would not weaken the claim that others may not treat me like one.

62. Woodward himself at points appears to recognize the limitations of his approach. He writes:

Just as it would be wrong of X to promise P to do AB and thus *create an obligation which he will fail to fulfill*, even though his actions will leave P better off than anything else X could do, so it would be wrong of those who plan energy policy to choose a [risky nuclear] policy that *involves the creation of the nuclear people* (and hence the creation of people with rights not to be killed, and so forth) and the subsequent violation of those rights, even if the choice of the nuclear policy leaves the nuclear people no worse off than they would be under any alternative policy.

Woodward, *supra* note 58, at 812 (emphasis added). As the circumlocution “involves the creation of” reveals, there is a key asymmetry between the case of irresponsible promising that begins the passage and the case of distant future persons that Woodward then takes up. In the former case one clearly “create[s]” the relevant rights and duties that one then violates, but in the latter case one does not.

We do so with another example. Suppose there is an unprofitable factory on the verge of shutting down. In order to become profitable and keep the factory open, the owner decides secretly to dump toxic waste into the nearby river rather than use a safe but expensive purification process. A year later, Adam and Betty are hired at the newly thriving factory, meet each other, and before long have baby Carl, who is born with a severe deformity caused by the unknown pollutant's effect on his mother's reproductive system.⁶³ If one thinks that Carl has a right to *exist in a non-deformed state*, one's next thought is likely to be that Carl could not exist in any way *but* deformed (for he exists only because of the toxic discharges that kept the factory in business so that his parents would meet); thus his right to be non-deformed cannot be respected, and so the right sounds silly. The problem with this supposed right to exist in a non-deformed state is that it neglects that rights always have reference to a behavioral relationship: A person has a right that a duty-bearer act in certain ways, either affirmatively or through forbearance.

Therefore, suppose that baby Carl, like everyone else, has among his many rights a right that nobody intentionally or negligently act in a way that causes him serious bodily injury; equivalently, the factory owner (like everyone else) has a duty not to act so as to cause serious bodily injury in that way.⁶⁴ These propositions are meant to reflect uncontroversial rights and duties of the sort familiar from the law of torts. The factory owner, by dumping the chemicals into the river, *does* act in a way that intentionally or negligently causes Carl serious bodily injury,⁶⁵ and in so doing he therefore violates Carl's right that

63. This example is adapted from Woodward, *supra* note 58. The problem, once again, is that Woodward says that the behavior of the factory owner parallels the case of an unprepared teenage girl deciding whether to have a child, who, in turn, "is roughly in the position of someone who is considering making a promise about an extremely serious matter which she has good reason to expect she will be unable fully to keep." *Id.* at 814-15. But the position of the factory owner, just like the position of present persons vis-à-vis distant future persons, does *not* parallel the position of an irresponsible promisor or procreator, or, at any rate, the cases differ enough that one's argument should not rely on the analogy.

64. Of course, the exact content of the rights and duties at issue here needs some further specification—for instance, exceptions for self-defense, necessity, etc.—but these qualifications do not affect the basic question at issue here.

65. The fact that the child's *existence* depends in an obvious way upon his parents' actions in procreating does not mean that the factory owner's actions do not cause the child's *injury*. The intervention of normal and foreseeable forces—in this case, procreation—does not negate causation. See RESTATEMENT (SECOND) OF TORTS § 443 (1977); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 272-81 (4th ed. 1971). Discussions of causation thus rely upon a common sense notion of the ordinary course of events, and the ordinary course of events includes human activity. See, e.g., *The City of Lincoln*, 15 P.D. 15, 18 (C.A. 1889). I generally follow the classic discussion of causation offered in H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 1-129 (2d ed. 1985). A point that Hart and Honoré emphasize is that a cause, both in law and in common sense, is a very different sort of thing from a factual precondition *sine qua non*—this is why discussions of causation require a background notion of

he not act in that way. Thus if one remembers that rights and duties are always relational in the foregoing way—that they are not entitlements to *be* (say) non-handicapped—then one realizes that the factual impossibility of Carl *being* non-handicapped does not have any bearing on the matter.

While admitting that he caused Carl's deformity, the factory owner might fall back on the claim that the child is nonetheless not worse off overall for what has happened.⁶⁶ Here we would return to the point, made several paragraphs ago,⁶⁷ about the specificity and multi-dimensionality of interests. Carl's right that the owner not act in the proscribed manner is separate from any evaluation of Carl's overall well-being (if such a thing exists).

3. *The Problem of Waiver*

But what if future people, like a willing medical patient, might somehow *waive* their rights against us? In a section of *Reasons and Persons* aptly titled *Why an Appeal to Rights Cannot Wholly Solve the Problem*,⁶⁸ Parfit introduces this issue by giving the example of a man who was born to a very young mother and yet who, despite hardships in his early years, was evidently leading an amply fulfilling life (as most such persons very likely do). Parfit thinks that we can say it would have been better for the girl to have waited. He denies, however, that we can explain this position by appealing to the child's rights:

[Suppose that] this man has a right to be born by a mature woman, who would give him a good start in life. This man's mother acted wrongly because she caused him to exist with a right that cannot be fulfilled. But . . . [h]e denies that his mother acted wrongly because of what she did to him. If we had claimed that her act was wrong, because he has a right that cannot be

the normal course of events. At the same time, nor is causation purely an evaluative notion, simply equivalent to moral or legal culpability.

66. He might even be tempted to say that he *caused* Carl to be not worse off—that is, by bringing about Carl's (worthwhile) existence. But this provides no escape. First, while conceding the owner's necessary part in the chain of events leading up to Carl's birth, his claim to have caused Carl's existence is inaccurate: we would instead say that the *parents* caused Carl to come into existence. (Similarly, while conceding our necessary part in the causal chain that leads to the existence of humans in the distant future, we cannot claim to cause the existence of someone born 200 years from now.) But, second, if the factory owner really wants to insist that he caused Carl to come into existence, then we need only employ Woodward's argument, discussed *supra* Subsection II.B.1., about irresponsible promisors, procreators, and other creators of rights.

67. See *supra* notes 60-61 and accompanying text.

68. PARFIT, *supra* note 1, § 124.

fulfilled, he could have said, "I waive this right." This would have undermined our objection to his mother's act.⁶⁹

Thus, Parfit thinks, we cannot explain why the girl should have waited by pointing to her actual child's rights. Instead, he thinks we would have to appeal to the fact that she could have given a better start to some other possible child later on—in other words, we appeal to an impersonal principle that compares alternative states of the world and various possible lives.⁷⁰

Parfit's claim is that future persons, who *ex hypothesi* will have lives well worth living, would waive their rights against us. If true, this might undermine a rights-focused approach. I believe, however, that there are powerful considerations that one can bring to bear against the waiver argument. To begin with, it is difficult to see what waiving or refusing to waive the right would require. Does one waive the right merely by refraining from committing suicide? In order to refuse waiver, must one demand to be returned to preconception non-existence? More fundamentally, the problem with the waiver argument is that once someone comes into existence with right *Z* violated, it is too late in the game to talk about waiving that right, for the wrong has already been committed.

The apparent nonsensicality of future persons waiving their rights against us shows that they do not exercise full control over our duties. But we frequently do not require right-holders to exercise such powers of waiver and enforcement. Minors, for example, do not have such powers with respect to their legal rights, nor do ordinary citizens possess such powers in connection with duties imposed by the criminal law. The issue of waiver, therefore, need present no obstacle to the holding of rights. Yet even so, if future persons are to have genuine legal rights against us, their rights have to be enforceable in some way, even if not through their own actions. How is this possible, even in principle? The remainder of this Part explains.

69. *Id.* at 364.

70. Joel Feinberg, normally an advocate of rights discourse, reaches a surprisingly similar conclusion regarding a relevantly parallel case: "There is no doubt that the mother did act wrongly, but it does not follow that her wrongdoing wronged any particular person, or had any particular victim. *She must be blamed for wantonly introducing a certain evil into the world, not for harming, or for violating the rights of, a person.*" JOEL FEINBERG, HARMLESS WRONGDOING 28 (1990) (emphasis added); see also Feinberg, *supra* note 43, at 168-76. His remarks are surprising because of his position in an earlier paper, *The Rights of Animals and Unborn Generations*, *supra* note 45, which defended future persons as right-holders. That paper, originally published in 1974, did not mention the non-identity problem. Perhaps Feinberg's discovery of the problem has diminished his enthusiasm for future persons' rights, at least in non-identity cases—which, of course, are almost all of the important cases.

C. How Enforcement?

The foregoing pages have appealed to current legal practices and to intuitions about rights. I have contended that denying the possibility of future persons' rights would require one to draw sharp distinctions where our ordinary understanding of rights does not draw them. Yet one could find the arguments appealing and still find it hard to accept the existence of right-duty relationships between people who do not simultaneously exist. One might have such a misgiving as the result of holding the image of a right-holder as someone who can drag a duty-bearer into court and personally demand enforcement of her right.

In fact, one leading understanding of rights employs just this type of imagery. This is the Will (or Choice) Theory of rights, according to which the crucial feature of rights, both moral and legal, is that they confer control over another's duty, which control is chiefly manifested by the right-holder's ability to extinguish the duty or demand its enforcement.⁷¹ Consider the position of an author who holds a copyright. Apart from recognized exceptions ("fair use," for example), everyone has a duty not to reproduce the copyrighted material unless the author first waives the duty by giving his permission to reproduce it. If someone copies the material without consent, the author may enforce the copyright by initiating legal action. The right-holder exercises control over the duty-bearer's conduct, as Hart memorably puts it, like a "small-scale sovereign."⁷²

The Interest (or Benefit) Theory is the contending, and probably more prevalent, conception of rights. According to it, a right protects one or more of the right-holder's interests or an aspect of his well-being.⁷³ To declare that I have a right against assaults is to indicate that my interest in bodily integrity is protected by a norm—legal or moral as the case might be—requiring others to behave toward me in a particular way. Interest Theorists certainly do not contend that

71. Leading explications and defenses of the Will Theory include H.L.A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM* 162, 181-88 (1982); STEINER, *supra* note 30, at 55-108, 229-65; and Hillel Steiner, *Working Rights*, in *A DEBATE OVER RIGHTS*, *supra* note 25, at 233. Raz argues that the Will Theory's emphasis on control and enforcement describes the nature of some legal rights but results in a distorted view of rights in general. See *supra* note 39 and accompanying text.

72. HART, *supra* note 71, at 183.

73. Joseph Raz is perhaps the most prominent contemporary advocate of (one version of) the Interest Theory. See RAZ, *supra* note 24, at 165-216; RAZ, *supra* note 39, at 29-44, 238-60. Matthew Kramer's work provides a sophisticated defense of the Interest Theory. See Kramer, *supra* note 25, at 60-101; Kramer, *supra* note 12, at 58-73. The most famous historical exponent of the Interest Theory is Jeremy Bentham; for a summary and critique of Bentham's views on rights, see HART, *supra* note 71. Bentham notoriously insisted that legal rights are the only kind of rights there are, but most adherents of the Interest Theory have no trouble recognizing the existence of moral rights, and Raz, if anything, privileges the moral over the legal.

every interest is or ought to be protected by a right; rather, it is for moral and political argument to determine the extent of rights.

Unlike the Interest Theory, which straightforwardly understands rights as Hohfeldian claim-rights, the Will Theory instead defines a right as the conjunction of a claim-right *and* a Hohfeldian power, namely a power of waiver/enforcement.⁷⁴ Because it adds this extra requirement, the Will Theory necessarily recognizes fewer rights than does its competitor, other things being equal. Since citizens typically cannot waive—and thus do not exercise full control over—a potential killer's legal duty not to kill them, strict Will Theorists conclude that the criminal law against murder, and public law more generally, typically does not endow ordinary citizens with any rights whatsoever. Similarly, Will Theorists usually assert that children and the insane, being incompetent and unauthorized to wield a power of waiver/enforcement, cannot hold any rights at all.⁷⁵

I should emphasize that both the Interest Theory and the Will Theory agree that all genuine (as opposed to merely nominal) legal rights must be enforceable. They disagree, however, over whether the entity with the power of activating the state's enforcement mechanisms has to be the same entity as the right-holder. To be sure, Interest Theorists readily acknowledge that it is often wise to vest the power of enforcement in the person who holds the Hohfeldian claim-right. But in cases where such powers are instead held by a prosecutor, state agency, legal guardian, or other such entity, the Interest Theory can nonetheless confer the status of right-holder on the being whose interests the right safeguards.⁷⁶

74. This is a simplification. For the Will Theorist, full control over a duty includes several powers spread over multiple stages. We can distinguish, for instance, powers of the following types: (a) to extinguish the duty or leave it in place, (b) to initiate action for enforcement when there is a (threatened) violation, and (c) to waive or demand the performance of any duties arising from the proceedings in (b). See HART, *supra* note 71, at 183-84. Needless to say, some of these powers might not apply in non-legal contexts, but those described in (a), at least, do appear indispensable to all Will Theory rights, whether moral or legal. See STEINER, *supra* note 30, at 69 n.22.

75. For the Will Theory's restrictions on the range of potential holders of rights, see H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 82 (Jeremy Waldron ed., 1984); STEINER, *supra* note 30, at 64-73, 245-46; and Steiner, *supra* note 71, at 250-51, 259-62. Note that the Will Theorists' refusal to extend rights to children, the insane, and animals does not imply that one is or ought to be permitted to treat those beings in any way one pleases; instead, the contention is that the protections afforded such beings do not thereby endow them with any rights.

76. An example from a recent Supreme Court decision helps illustrate the key difference between the two approaches. In *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001), the Court ruled that private citizens could not sue to enforce their rights under federal regulations that prohibit disparate-impact discrimination in programs that receive federal funding. Citizens may still bring private suits to enforce rights guaranteed directly by Title VI, the statute authorizing the regulations, but the statute itself, as opposed to the regulations, outlaws only intentional (as opposed to disparate-impact) discrimination. *Id.* at 1516. Disparate-impact regulations promul-

This brief summary of the two contending conceptions should make it clear that the noncontemporaneity between future people and present people has striking consequences within the Will Theory. A strict version of the Will Theory would disqualify future persons as potential right-holders because such individuals are incapable of controlling any duties we might bear.⁷⁷ But not even all adherents of the Will Theory are comfortable with such a narrow view of right-holding.⁷⁸ Simply because minors cannot enforce their rights against abuse, Will Theorists say they have none. No citizen, under the Will Theory, enjoys rights under the criminal law or any other law compliance with which he cannot personally (or through a personally delegated agent) demand or waive. As will become clearer as we proceed, recognizing future persons' rights requires nothing more extravagant than that we accept that minors can have rights or that citizens can have rights under public law. It is the adherent of a strict version of the Will Theory, not the advocate of rights for future individuals, who is making implausible claims.

The Interest Theory separates rights from powers of enforcement, clearing the way for the attribution of rights to beings unable or unauthorized to press their own case. Just as children and the insane can have representatives enforce their rights for them, so can future persons. Of course, in order to represent a being, we have to be able to tell what advances its interests. A guardian of a comatose human can look to the person's pre-coma preferences for guidance in this

gated under Title VI can, however, still be enforced by federal agencies, which have the power to cut off funding to recipients who engage in disparate-impact discrimination. *Id.* at 1521. After *Sandoval*, do citizens still have a right to be free of disparate-impact discrimination perpetrated by recipients of federal funding? The Will Theory answers negatively, since citizens no longer have the power to enforce the duty imposed by the regulations. The Interest Theory, in contrast, maintains that the right still exists yet can now be enforced only by a government agency.

77. Hillel Steiner takes such a position:

A future person is necessarily incapable of either waiving or demanding a present person's compliance or preventing a present person's non-compliance or penalizing him for it, because *ex hypothesi* two such persons lack any element of contemporaneity. And this necessary lack of contemporaneity also implies the logical impossibility of future persons authorizing some present persons to exercise those powers.

STEINER, *supra* note 30, at 261 (footnote omitted); see also Hillel Steiner, *The Rights of Future Generations*, in *ENERGY AND THE FUTURE* 151, 154-56 (Douglas MacLean & Peter G. Brown eds., 1983).

78. See, e.g., HART, *supra* note 71, at 184 n.86, 185 n.88. Here Hart is more solicitous toward children and other persons not *sui juris* being right-holders as long as the usual Will Theory powers are vested in a representative. What he still does not countenance is the thought that such persons are right-holders just because they are the beneficiaries of others' duties. Control over duties remains the key to right-holding, but here Hart is apparently willing to see it put into others' hands in limited circumstances. Since my account contemplates future persons' rights as enforceable by representatives vested with the rights' associated powers, one could make an argument for them being Will Theory right-holders on this relaxed version of the theory.

respect. But we cannot know future persons' interests in much detail at all, which can make representation more difficult. Instead, we have to fall back on the most general knowledge about what is usually good for humans, much as we do in the case of infants.

Armed with only this general knowledge, the questions with respect to which we could adequately represent future persons' interests would be severely limited in range and specificity. However, as I argue in Part III, our power predictably to affect the further future is also severely limited. Yet with respect to those few variables we *are* able reliably to manipulate, suppose that we could be quite confident, simply by drawing on our general knowledge, about how to advance future persons' interests.⁷⁹ There would thus be a rather happy coincidence: The scope of our ability to represent future persons, limited as it is, would largely overlap with the extent of our ability to affect their interests with any reliability, and thus with the range of our duties' possible content. The content of intertemporal norms, indeed, is the topic of the following pages. As I shall argue, we can interpret the actions of government environmental agencies as enforcing rights future people hold under certain provisions of positive law. Enforcement, therefore, is not only possible but indeed actually occurring.

III: WHICH RIGHTS? FINDING CONTENT

As Part II argued, it is possible for future people to hold rights against us. Ascriptions of such rights can have real meaning, in addition to obvious rhetorical value. Yet while we *can* owe duties to future people as a formal matter, that does not suffice to show that we in fact do have any such duties, much less what those duties are. Answers to these latter questions hinge on the actual substantive content of the moral and legal norms, if any, that govern our conduct with respect to posterity.

This Note, of course, is not intended to offer a comprehensive account of what the content of future persons' rights (and our duties) ought to be. Nonetheless, if the rights-based approach is to be an attractive way to conceive of intergenerational relations, showing that future persons' rights are a logical possibility constitutes only a partial success. This Part, therefore, aims to show that future people do in fact possess rights under the most reasonable interpretation of current law and practice. Toward that end, I turn to environmental

79. As one commentator put it: "No one needs to be privy to the individual wills of future persons to claim their right to clean air." Annette Baier, *The Rights of Past and Future Persons*, in RESPONSIBILITIES TO FUTURE GENERATIONS, *supra* note 7, at 171, 172.

law, where a number of national and international legal instruments arguably confer rights on future persons—rights that, at least in the case of national legislation, are enforced by government agencies.

The second half of this Part then considers several factors that limit the possible content of intertemporal normative relations. Due to the nature of rights-based systems, considerations of future persons' rights will not offer complete guidance in certain areas. Moreover, regardless of one's moral theory, our obligations to posterity are significantly constrained by our imperfect ability to predict the effects of our actions into the further future. It is precisely in areas such as environmental protection, however, that our causal and predictive powers, and thus our possible duties, are greatest.

A. Rights Under Positive Law

Future persons would lack rights if there were no norms regulating our conduct toward them. And even if such norms do exist, it might be that we have only duties *concerning* future persons, but no duties owed *to* them, to which they would hold corresponding rights. That is, though we have a legal duty not to destroy endangered flowers, that does not necessarily mean that those flowers have any rights. Laws against cruelty to animals might be of that kind too, depending on whether or not one thinks they impose duties for the animals' sake or, instead, merely for the sake of our own character or our neighbors' humane sensibilities. In the same way, a law requiring some sacrifice beneficial to posterity would not thereby invest future people with any rights if it were enacted solely, say, for the sake of present persons' feelings. Finally, while moral rights perhaps need not be enforceable, all genuine (rather than merely nominal) legal rights must be enforceable. Therefore, we shall say that future people hold rights if and only if the following conditions hold:⁸⁰

1. There is a norm protecting their interests or an aspect of their well-being; and
2. It is for future persons' sake that the norm is imposed,⁸¹ and

80. Note that the following test for right-holding is in fact more stringent than the Interest Theory test originally formulated by Bentham. For an exposition of Bentham's test, see Kramer, *supra* note 25, at 80-91.

81. It is, of course, not always easy to determine if a particular legal or moral norm exists for a particular person's or entity's sake. The Supreme Court, however, thinks the question is meaningful and determinate enough to include it as part of the test for whether a statute creates an implied private right of action. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) ("[S]everal factors are relevant. First, is the plaintiff one of the class for whose especial benefit the statute was enacted[?]" (internal quotation marks omitted)). I do not mean to imply that private rights of action are the appropriate means of enforcing future persons' rights; the point here is simply that determining the beneficiary of a statute is an accepted judicial inquiry.

3. In the case of legal rights, the right is enforceable (though not necessarily by the right-holder).

The criteria are not, of course, beyond dispute. They reflect a bias toward the Interest Theory of right-holding in that they do not require, as a strict version of the Will Theory would, that a right-holder herself exercise control over duty-bearers. The criteria do, however, accommodate versions of the Will Theory according to which a person can hold a right even if the power to enforce that right is vested in a guardian, state official, or other party.⁸² As before, in order to grant that future people can have rights, one need only grant, for example, that minor children have rights or that citizens hold rights under the criminal law.⁸³ Future people, just like current people, can possess many rights that they themselves cannot sue to enforce.

One can find instruments in both international and domestic law that satisfy the criteria for right-holding. Readers for whom enforcement is the key criterion in identifying a right will be most interested in the section covering domestic law. First, however, I consider international law.

1. *International Law*

A number of international environmental treaties require those currently alive to undertake sacrifices that predictably will advance the interests of posterity. More importantly, some of these agreements make it explicit that future people are among the persons for the sake of whom the protections are enacted. The United Nations Convention on Biological Diversity, to choose one example, declares that the parties to the agreement are "[d]etermined to conserve and sustainably use biological diversity *for the benefit of present and future generations*."⁸⁴ In a similar vein, the North American Agreement on Environmental Cooperation opens by noting "the essential role of cooperation [on environmental issues] in achieving sustainable development *for the well-being of present and future generations*."⁸⁵ In other cases, while an explicit mention of future persons and their well-being is lacking, one can arguably infer it. Given the

82. See *supra* note 78.

83. See *supra* Section II.C.

84. Convention on Biological Diversity, June 5, 1992, preamble, 31 I.L.M. 818, 823 (emphasis added). Like most of the examples I cite, the language refers to future generations rather than persons. The protections should, however, be understood as decomposable into protections for the individuals comprising the future generation; see *supra* notes 40-41 and accompanying text.

85. North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, preamble, 32 I.L.M. 1480, 1482 (emphasis added).

gradual, cumulative, and long-lasting impact of ozone depletion, for example, it is unlikely that presently existing persons are the only ones intended to benefit from an "obligation . . . to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer."⁸⁶

By perusing the body of these and similar treaties,⁸⁷ one can put together a fairly extensive catalogue of protections intended to benefit future people. Of course, the protections will mean little if there is no way to enforce them. International instruments can contain enforcement mechanisms, such as the imposition of punitive tariffs or sanctions on violators,⁸⁸ but there is of course the second-order problem of ensuring that parties carry through in enforcement of the enforcement mechanism. As long as states are sovereign, the reality of collective enforcement remains fraught with uncertainty. Even in the absence of truly effective international enforcement regimes, however, norms of international law can in some instances have effect in domestic courts.⁸⁹ In any case, even if these treaties were ultimately toothless, a legally unenforceable right beats no right at all.⁹⁰ Laws

86. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, preamble, 1522 U.N.T.S. 3, 29-30, 26 I.L.M. 1550, 1550.

87. Many international treaties refer to the interests of future generations. *See, e.g.*, Framework Convention on Climate Change, May 9, 1992, preamble, 31 I.L.M. 849, 852 ("Determined to protect the climate system for present and future generations"); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, preamble, 27 U.S.T. 1087, 1090, 993 U.N.T.S. 243, 244 ("Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come"). *See generally* FUTURE GENERATIONS AND INTERNATIONAL LAW, *supra* note 11, app. (collecting various international legal documents protecting future generations).

88. International environmental agreements typically do not provide for such measures, but some have advocated them as means of increasing compliance. *See* Leesteffy Jenkins, *Trade Sanctions: Effective Enforcement Tools*, in *IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW* 221 (James Cameron et al. eds., 1996).

89. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 114, 906-07 (1987) [hereinafter RESTATEMENT]; Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2281-91 (1991).

90. One could object that these agreements endow no person, present or future, with any rights whatsoever, enforceable or otherwise; rather they give rights only to signatory states. While that is surely true of many treaties, as a general statement it is not true that individuals cannot hold rights under international law. *See* RESTATEMENT, *supra* note 89, pt. II introductory note, pt. VII introductory note, § 906 cmt. a & reporters' note 1 (approving of individuals as right-holders under international law); M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 64-74 (1984). One should also recall that an individual can hold a right even when he or she is not personally authorized to enforce it. *See supra* Section II.C.

Determining whether a treaty endows individuals with rights depends of course largely upon the language of the particular document. *See* The Head Money Cases, 112 U.S. 580, 598-99 (1884). The agreements cited in this Subsection explicitly declare their intent to protect future people. Since some international agreements are accurately interpreted as endowing present

that are probably unenforceable can nonetheless attract considerable compliance, as ozone protocols have demonstrated.⁹¹

In the absence of truly effective sanctions, moral suasion and public pressure are leading forces in securing adherence to international environmental standards.⁹² In an effort to increase the visibility of issues affecting future generations, the Maltese delegation to the 1992 Rio Earth Summit devised a plan to institute a global "guardian" charged with representing the interests of future generations.⁹³ Even if the role of the guardian were limited to exhortation and attention-calling, such are the means by which nations gradually come to accept international norms as obligatory.

Still, if one is really concerned about enforcement and compliance, then international conventions and protocols, environmental or otherwise, are certainly not the best places to look. One can avoid the various problems surrounding international law by looking instead at national legislation as a source of future persons' rights.

2. National Legislation

A number of countries' environmental laws announce that their protections are intended (partly) for the benefit of future people. For example, federal legislation directs the National Park Service to manage the parks so as to "leave them unimpaired for the enjoyment of future generations."⁹⁴ Similarly, the National Environmental Policy Act announces that its intention is, among other things, to "fulfill the social, economic, and other requirements of present and future generations of Americans. . . . [and] fulfill the responsibilities of each generation as trustee of the environment for succeeding genera-

individuals with rights, the agreements at issue here—with their explicit language—should certainly be construed as endowing future individuals with rights.

91. See Ozone Secretariat, United Nations Environment Program, *Action on Ozone* 16-17 (2000), available at <http://www.unep.org/ozone/index-en.shtml> (noting dramatic declines in production of ozone-depleting substances since the signing of the Vienna Convention for the Protection of the Ozone Layer in 1986); Ozone Secretariat, United Nations Environment Program, *Production and Consumption of Ozone Depleting Substances, 1986-1998*, at 12-41 (1999), available at <http://www.unep.org/ozone/DataReport99.shtml> (providing data). See generally INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS (Edith Brown Weiss ed., 1997). "The common assumption is that countries comply much better and more fully with binding international agreements than with nonbinding legal instruments. Experience suggests an alternative hypothesis: that countries under some circumstances may comply with legally nonbinding instruments as well as they do with binding ones." *Id.* at 1.

92. Cf. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (developing a norm-internalization model of obedience to international law).

93. The Maltese plan is described in Christopher D. Stone, *Safeguarding Future Generations*, in FUTURE GENERATIONS AND INTERNATIONAL LAW, *supra* note 11, at 65.

94. 16 U.S.C. § 1 (1994 & Supp. IV 1998).

tions.”⁹⁵ Many foreign laws and constitutions show a similar intention to protect the interests of future generations.⁹⁶

Genuine legal rights are enforceable, and the power of enforcing environmental protection measures such as those discussed above usually rests primarily with a government agency or official. In this respect these measures resemble laws concerning child neglect, minimum wages, and safety in the workplace. According to the Interest Theory, all of these laws endow their beneficiaries with rights, even if their owners cannot themselves enforce those rights. If state agencies can be understood as enforcing children's rights against parental neglect or the rights of current citizens against polluters, then I see no impediment to interpreting such agencies as enforcing the rights of future persons when those agencies act to protect future persons' interests under a law enacted (at least partly) for their sake.

This interpretation of the activities of environmental agencies indeed has significant textual support. Consider, for instance, the Illinois Constitution, which provides as follows: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.”⁹⁷ The first sentence announces duties with respect to the environment and identifies future people as among the class intended to benefit therefrom; the second then empowers and directs the legislature to “implement[] and enforce[]” those entitlements. So when the legislature creates an agency charged with rulemaking and adjudication in the sphere of environmental affairs, we should understand that agency as enforcing the rights of current and future citizens of Illinois. This interpretation of the role of state agencies also finds support in officials' self-understandings of their enforcement activities. In one case, for example, after filing suit to enjoin a government pipeline project, the Iowa Attorney General stated that his aim was “to protect the river for future generations.”⁹⁸

95. National Environmental Policy Act of 1969 § 101(a)-(b)(1), 42 U.S.C. 4331(a)-(b)(1) (1994).

96. *E.g.*, Environment Act, No. 127, 1986 (N.Z.) (“An Act to . . . [e]nsure that, in the management of natural and physical resources, full and balanced account is taken of . . . [t]he needs of future generations”); *see also* WEISS, *supra* note 10, at 107 & app. B (noting and excerpting foreign constitutions that extend protections to future generations).

97. ILL. CONST. art. XI, § 1.

98. Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 565 n.311 (1984) (quoting *Three States Sue U.S. on Missouri River Coal Pipeline Project*, WASH. POST, Aug. 19, 1982, at A4).

Rights can of course be enforced in other ways. Rather than leaving the task to an existing environmental agency, some lawyers and philosophers have suggested the creation of new offices the sole purpose of which would be the enforcement of future persons' rights. One popular proposal would create an independent ombudsman charged with intervening in administrative and judicial proceedings that threaten future persons' interests.⁹⁹ Unlike the proposal for an international guardian,¹⁰⁰ whose role would necessarily be exhortatory and informational more than anything else, the role of ombudsman could certainly be implemented in a more meaningful way within the domestic legal regime, where in fact various forms of legal guardians and representatives are routinely appointed.¹⁰¹

In addition to public enforcement proceedings instigated by environmental officials, there is the possibility of allowing citizen-initiated suits. A fairly straightforward example of such private enforcement is a suit by an environmental interest group on behalf of its members.¹⁰² Extending the reasoning of such suits, some commentators have argued that future people, with the help of a present litigant or lawyer to act as a proxy, should have standing to sue to enforce environmental statutes.¹⁰³ In at least one concededly unusual case, a federal judge allowed a conservation group to file suit as lead member of a class that included "generations yet unborn."¹⁰⁴

99. See WIESS, *supra* note 10, at 124-26; Ted Allen, Note, *The Philippine Children's Case: Recognizing Legal Standing for Future Generations*, 6 GEO. INT'L ENVTL. L. REV. 713, 739-41 (1994).

100. *Supra* note 93 and accompanying text.

101. In a well-known opinion advocating standing for natural objects, Justice Douglas contended that "[p]ermitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians ad litem, executors, conservators, receivers, or counsel for indigents." *Sierra Club v. Morton*, 405 U.S. 727, 749 n.8 (Douglas, J., dissenting). See also CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1974). The idea of representation is of course much more persuasive in the case of future generations, since it is clear both that they have interests and that, within a certain range, we know what would advance them. See *supra* note 79 and accompanying text.

For a summary of various approaches to representing future generations in domestic and international legal contexts, see Weiss, *supra* note 98. Note especially her discussion, *id.* at 566-69, of the potential for employing the law of charitable trusts as a model for litigation on behalf of future persons.

102. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

103. See Raymond A. Just, Comment, *Intergenerational Standing Under the Endangered Species Act: Giving Back the Right to Biodiversity After Lujan v. Defenders of Wildlife*, 71 TUL. L. REV. 597 (1996); E. Joshua Rosenkranz, Note, *A Ghost of Christmas Yet To Come: Standing To Sue for Future Generations*, 1 J.L. & TECH. 67 (1986). In 1993 the Supreme Court of the Philippines granted standing to a group of children claiming to represent future generations. Allen, *supra* note 99, at 713-18.

104. *Cape May County Chapter, Inc., Izaak Walton League of Am. v. Machia*, 329 F. Supp. 504, 514 (D.N.J. 1971). The court found that the members of the class, including those as yet

The prospect of including future generations as members of private class action lawsuits raises a number of vexing questions. What if both sides claim to represent posterity's interests? And aren't legislatures better situated than courts to weigh the competing values? Nor are non-litigation proposals such as the Maltese plan free of problems.¹⁰⁵ Yet even if we eschew these comparatively exotic measures—and perhaps we should—it remains arguably true that already existing national and (more controversially) international laws and institutions do in fact endow future persons with genuine, enforceable legal rights. Indeed, as long as we agree that state action can constitute enforcement of individuals' rights, then I would submit that the best interpretation of current environmental practice is that future persons' rights are, at least sometimes, being enforced right now.

B. Contours of Content

The account of the content of future persons' rights has so far been interpretive, attempting to show which entitlements they in fact possess under existing legal instruments. I have identified a number of such rights in the area of environmental protection. One might expect, however, that a satisfying prescriptive account of posterity's rights would have to include norms governing a number of areas I have not discussed, ranging from population to government debt to fuel conservation. The aim here is not to present a comprehensive normative theory of intergenerational justice, and, in any case, others have done important work in the effort to articulate what morality requires of us with respect to posterity.¹⁰⁶ Yet it is possible to provide an indication of some of the general contours of any successful normative account. In particular, there is good reason to believe that the substantive requirements imposed by any sensible set of rights will be limited in significant ways. These constraints on content issue partly from the generally underdeterministic nature of rights-based thinking and partly from the profound uncertainty that besets our thinking about the future.

1. Underdetermination

According to the aggregative approach to morality typified by utilitarianism, states of affairs can in principle always be ranked from

unborn, "have special beneficial interests which are subject to injury and damage and which are within the 'zone of interests' sought to be protected by National legislation, particularly [the National Environmental Policy Act of 1969]." *Id.* at 516.

105. See Stone, *supra* note 93 (discussing the practical complications of such plans).

106. See, e.g., ENERGY AND THE FUTURE, *supra* note 77; WEISS, *supra* note 10.

morally best to morally worst. If we can fully rank alternatives in this way, then morality always tells us the best thing to do. A rights-focused approach is inherently less ambitious in that it does not provide a complete moral ranking nor attempt to tell us exactly what to do in every case. On the contrary, rights merely constrain the range of options from which we may choose, leaving a significant role for considerations of collective goals, individual aims, aesthetic judgment, cultural narratives, and other wholly valid reasons on which to base our actions. Thus, as one philosopher has observed, "considerations based on the rights of future persons cannot fully guide us in a good number of decision-making situations concerning the future."¹⁰⁷ I wholeheartedly agree with his statement, but while he means it as a condemnation of a rights theory, I take it as a commendation. We are required to perform our duties, but beyond that we are at liberty.¹⁰⁸

The difference between a rights-focused approach and a maximizing account is particularly prominent with respect to population issues. If morality requires that one act in every situation so as to create the most happiness (or whatever value one's theory maximizes), then sometimes this goal requires us to make existing people happier, but other times it requires us to *make happy people existent*.¹⁰⁹ A rights-focused approach, because it concerns deontic relations between actual persons, albeit temporally separated ones, makes it difficult, if not impossible, to articulate a right to be conceived in the first place.¹¹⁰

This is not to say that such an approach cannot accommodate moral reasons, and even duties, to procreate.¹¹¹ If I promised my ailing

107. Lukas H. Meyer, *More Than They Have a Right to: Future People and Our Future-Oriented Projects*, in CONTINGENT FUTURE PERSONS, *supra* note 13, at 137.

108. In some cases, of course, the set of permissible actions might be so restricted as to be practically determinative. This is, however, the result of accident rather than necessity.

109. Two contributions to opposing sides of the large literature on whether there is a duty to bring happy people into existence are William Anglin, *In Defense of the Potentiality Principle*, in OBLIGATIONS TO FUTURE GENERATIONS, *supra* note 3, at 31 (answering affirmatively); and Mary Warren, *Do Potential People Have Moral Rights?*, in OBLIGATIONS TO FUTURE GENERATIONS, *supra* note 3, at 14 (answering negatively). Most thoroughgoing utilitarians see a duty to produce people who would be happy—or happier than the average, for so-called average utilitarians—as long, of course, as doing so is not outweighed by losses to existing people. *But see* Jonathan Bennett, *On Maximizing Happiness*, in OBLIGATIONS TO FUTURE GENERATIONS, *supra* note 3, at 61 (rejecting such a reading of utilitarianism); Jan Narveson, *Future People and Us*, in OBLIGATIONS TO FUTURE GENERATIONS, *supra* note 3, at 38 (same).

110. This is a feature of my account but perhaps not necessarily of rights theories in general (though it is a good bet that any purported rights theory that includes such a right is in fact a maximizing theory masquerading as a rights theory).

111. Thus I have to disagree with Douglas MacLean, *A Moral Requirement for Energy Policies*, in ENERGY AND THE FUTURE, *supra* note 77, at 180, 184. He begins with an accurate

parents that they would see a grandchild before they die, then very possibly they have a right that I give them one. I might even owe them a duty to procreate in the absence of anything so dramatic as such a promise: it might simply be the only way to repay them for raising me, for instance. Turning to the bigger picture, if past generations have sacrificed in order to promote the interests of generations beyond this one, that fact might impose upon us a duty to continue the species. While I do not deny the importance of these and other kinds of reasons for bringing future persons and generations into being, my approach does reject the existence of any procreative reasons generated by the rights of future persons themselves. Respecting rights is generally underdeterministic with respect to procreation decisions.

A critic might argue that the rights-centered approach's implications for population issues are rather more troubling than I claim. Not only do considerations of future persons' rights not give us any reason to continue humanity, the objector would say, but respect for posterity's rights positively stacks the deck in favor of mandatory extinction. For if people have a right to certain conditions, and if the required conditions are not available beginning in (say) the year 2150, then apparently it would be wrong for the people alive in 2150 to have children. Respect for rights would, evidently, require extinction.

This is a misunderstanding, however. As I emphasized earlier, persons' rights (and duties too) are always part of a relationship. Particular persons have rights that other particular persons (the duty-bearers) act in particular ways. If Anne has a duty to give me \$20 (or pay me a living wage, or refrain from stabbing me, etc.), I equivalently have a right that she act in the specified way. What I do not have is an independently existing right *to* \$20 from the world, nor does my right against Anne imply anything regarding Ben's duties in those areas of conduct. Similarly, I might be permitted to have a suffering pet put to sleep, but that does not mean that third parties possess a general liberty to kill it. For the same reason, the existence of a right-duty relationship between future persons and present persons, the content of which requires that we act in a certain way, does not tell us anything about the duties of potential parents in 2150. It could be the case, for example, that potential parents are always at liberty to procreate (that is, they lack a duty not to do so) as long as they ex-

premise: "A possible person is not wronged or treated unfairly if left unconceived; no lack of respect is shown." *Id.* But then he draws a faulty conclusion: "If we think only in terms of rights or justice, then we can conclude only that whether or not we fail to preserve human life has no moral importance. Our strong contrary intuition that acting to make future life impossible is not a matter of moral indifference forces us to think in other terms." *Id.*

pect their child to have an opportunity to live a decent life. (This is of course only one possibility; I do not present an account of procreational rights and duties.) The guiding principle—both for us now and for the potential parents in 2150—is the rule that one ought not to breach one's duties. But this is not the same thing as saying that one ought to act so as to minimize the number of rights violations (whatever that would mean). Current persons' breaches of duty need not require preventing procreation at some later date.

The fact that considerations of future persons' rights typically do not prescribe a single best course of action introduces an element of theoretical underdetermination into intertemporal relations. My sense is that this freedom, within the constraints marked out by rights, is desirable in that it allows appeal to other aims and reasons for action that strike us as worthy. But even if one adheres to a maximizing account under which morality always in principle designates the best thing to do, the content of intertemporal norms is still severely limited by practical considerations.

2. *Practical Uncertainty*

Any account of intertemporal relations, whether based on rights or not, has to confront the simple fact of uncertainty about the future, an obstacle that is more theoretically mundane than the non-identity problem but probably much more important in practice. The uncertainty is profound and takes several forms. To begin with, we cannot even be sure what future people will be like. This presents an especially urgent problem for utilitarians, as it makes it difficult to figure out what kinds of things will make future people happiest.¹¹² But this uncertainty about the character of future persons, though perhaps highly significant as the temporal horizon lengthens, is almost certainly overwhelmed at all points along the timeline by the basic uncertainty surrounding the effects of our actions. Uncertainty and unpredictability severely constrain the range of the possible content of intertemporal duties.

Some philosophers, John Rawls most prominent among them, have thought that our duties to posterity mainly concern a "just rate of intergenerational savings."¹¹³ Their emphasis on savings is certainly understandable: Macroeconomists tell us that improving a soci-

112. Ernest Partridge, *Future Generations*, in A COMPANION TO ENVIRONMENTAL PHILOSOPHY 377, 380 (Dale Jamieson ed., 2001).

113. See RAWLS, *supra* note 29, § 44. My comments about the economics of growth will simplify matters, but not misleadingly for the argument at hand; for an introduction to macroeconomic growth theory, see N. GREGORY MANKIW, MACROECONOMICS 77-131 (4th ed. 2000).

ety's level of material prosperity depends crucially upon increasing the amount of capital per worker; the growth of the capital stock, in turn, is a function of national savings. If we invested more and consumed less, we could leave our children with a larger capital stock and, predictably, a wealthier and more productive economy. But while a policy of increasing the current rate of capital investment would likely make the next generation or two better off, our decision would have very little hope of reliably influencing economic conditions in the further future. Would we be any better off if our ancestors had left us a huge stock of telegraph equipment?

More seriously, there are of course other ways to invest in the future besides bequeathing our children a mass of soon-to-be obsolete capital. We can instead give them conditions conducive to the future formation of capital, such as low interest rates. The United States during the 1980s, with huge deficits and a ballooning national debt, was creating just the opposite conditions. The predicted macroeconomic legacy of such a large public debt is higher interest rates and the crowding out of private sector investment in new capital. Yet, more recently, while the "new economy" held sway, the Treasury began using an unexpected bonanza of revenue to retire some outstanding debt,¹¹⁴ and businesses invested massively in new technology.¹¹⁵ Government economists predicted budget surpluses "as far as the eye can see," where only a few years before the same prediction had been made of deficits.¹¹⁶ By early 2002, recession and the War on Terrorism were returning us to deficit spending.¹¹⁷ Plainly, our ability to forecast economic variables is extremely limited over even a very short period of time.

As the temporal horizon lengthens from years to decades to centuries, we have less and less reason to accept the economists' typical assumption of *ceteris paribus* as even a rough approximation. Wars, droughts, oil embargoes, market crashes, remarkable booms, and unimaginable new discoveries—all of which fall outside the models—break any predictable causal links between today's economic policies and the rate of productivity in 2200. Our ability predictably to in-

114. *U.S. Treasury to Retire More Debt in Quarter*, L.A. TIMES, Feb. 1, 2000, at C7.

115. Alex Berenson, *Surging Profits May Indicate a Longer Life for the Bull Market*, N.Y. TIMES, Jan. 22, 2000, at C1.

116. As Federal Reserve Board Chairman Alan Greenspan remarked, the phrase "was originally used on the deficit side, and it was very obvious that 'as far as the eye could see' wasn't all that far." Patrice Hill, *Social Security Warning Issued; Greenspan Doubts Surpluses Sufficient*, WASH. TIMES, Jan. 29, 1999, at A1. Greenspan cautioned against relying on then-projected future surpluses. *Id.*

117. Richard W. Stevenson, *Bush Tries to Head Off Fight over Raising the Debt Ceiling*, N.Y. TIMES, Feb. 28, 2002, at A18.

fluence future economic variables thus extends only a generation or two at most. This, however, is roughly the same distance over which our rational prudence and extended egoism likely suffice to motivate us to save. Only after we leave that brief time span do we increasingly need to rely on reasons of duty. But, simultaneously, the passage of time truncates our relevant causal powers and, thus, limits the possible duties we might have. I would therefore suggest, *pace* Rawls, that the subject matter of justice over time does not centrally concern rates of savings and capital formation.

If we look at what we *can* do to affect the distant future in a predictable way, we will probably find that issues like the environment come to the fore. Some pollutants can linger in the atmosphere for many decades or contaminate the soil for centuries. The longevity of some radioactive waste is on the order of millennia. A species that goes extinct now will be gone forever. Whatever the character of future persons, we have good reason to think certain long-lasting changes to the environment will do them no good.¹¹⁸ It is therefore no accident that our examination of future persons' rights under existing legal instruments concerned precisely these kinds of issues. The currency of intertemporal justice, as it were, is CO₂, not GDP.

Of course, even within the environmental domain, uncertainty still looms large. Future people might have a statutory right that the Director of the Park Service manage Yellowstone so as to leave its beauty unimpaired,¹¹⁹ but there is significant room for disagreement over which policies best effectuate that aim. We should therefore expect to see park managers given a good deal of discretion over how exactly to carry out their duties.¹²⁰ A rights-oriented approach thus in no way cuts off debate. Indeed, how best to define and respect rights, including those of future persons, is above all a matter for careful legal, political, and moral discussion.

CONCLUSION

Like many others who have written about these issues, I have tried to vindicate our pre-theoretical intuition that future people's future-

118. What we also know is that many environmental problems have a time-delayed fuse: An activity can be useful for us and our immediate descendants but have catastrophic consequences for more distant generations. Thus the "chain" model of intergenerational relations, *see supra* note 19 and accompanying text, is absolutely the wrong approach in handling such issues.

119. *See supra* note 94 and accompanying text.

120. *E.g.*, *Greater Yellowstone Coalition v. Babbitt*, 952 F. Supp. 1435, 1441 (D. Mont. 1996) ("[16 U.S.C. § 1] obviously gives park managers broad discretion in determining how best to conserve wildlife and to leave them unimpaired for future generations."), *aff'd*, 108 F.3d 1385 (1997). The case concerned how best to manage the park's bison population.

ness, including the fact that our choices determine their identities, should not diminish their moral claims on us. But while some others have thought it necessary to develop new and different normative approaches, the argument here has employed the familiar language of rights.

One of the main tasks was simply to show that it is even possible to use the language of rights in this way. Part II argued that it is possible, that the concept of rights, if carefully explicated, can indeed withstand the various pressures exerted by the case of intergenerational relations. Central to the argument was its orientation toward practical reason rather than toward metaphysical inquiries into whether an as-yet unconceived “person” has rights at this moment. What should concern us is the practically grounded question of whether we can stand in a right-duty relationship with future people. The most plausible interpretations of our current moral and legal practices suggest that we can. In particular, neither mere futureness nor the non-identity problem acts as a bar to future people holding rights against us. Thus they can have rights, and indeed they have them right now, as long as one accepts uncontroversial views such as that minors have rights.

I have noted many times that one who acknowledges future people’s rights need not be a radical. But this is not to say that he or she cannot be. Rights are a way of articulating requirements—and as I have argued, the most appropriate way when it comes to future people—but adherents of a rights-oriented approach can disagree sharply about the extent and substance of those requirements. Indeed, the domain in which the rights of future individuals are probably most important—environmental decisions with long-lasting effects—is one of the most hotly contested areas of public policy. Part III listed a number of protections in this area that future people already enjoy, and it laid out considerations that powerfully constrain the possible content of any plausible normative account of intertemporal justice. Even within the bounds of those constraints, however, the range of possible rights and duties is immense, and I have not tried to say exactly what future people’s rights demand that we do. Instead my aim has primarily been to show that rights *make sense*. It is for others to identify, through substantive moral and political argument, the particular rights that *make sense of* our commitments, both as they are and as they ought to be.

